. 84-76-AFX
atus: GRANTED

Title: Nell Hunter, et al., etc., Appellants
v.
Victor Underwood and Carmen Edwards, etc.

cketed:
ly 9, 1984

Court: United States Court of Appeals
for the Eleventh Circuit

Counsel for appellant: Ward, James S.

Counsel for appellee: Still, Edward

try	Date	Note	Proceedings and Orders
1	Jul 9 1984	G	Statement as to jurisdiction filed.
2	Jun 4 1984		Application for stay filed, and order denying same by Powell, J., on June 5, 1984. (A-990)
4	Jul 27 1984		Order extending time to file response to jurisdictional statement until September 10, 1984.
5	Aug 15 1984		DISTRIBUTED. September 24, 1984
7	Sep 11 1984		Motion of appellees Victor Underwood, et al. to affirm filed.
8	Sep 12 1984		REDISTRIBUTED. October 5, 1984
9	Oct 9 1984		PROBABLE JURISDICTION NOTED.
			**********
0	Nov 21 1984		Joint appendix filed.
1	Nov 21 1984		Brief of appellants Nell Hunter, et al. filed.
2	Dec 10 1984		Record filed.
3	Dec 10 1984		Certified copy of original record & C.A. proceedings, 5 volumes, received.
5	Dec 17 1984		Order extending time to file brief of appellee on the merits until January 7, 1985.
6	Dec 21 1984		Record filed.
7	Jan 4 1985		SET FOR ARGUMENT. Tuesday, February 26, 1985. (1st case.)
8	Jan 10 1985		Brief of appellees Victor Underwood, et al. filed.
9	Jan 7 1985		Brief amicus curiae of NAACP Legal Defense and Educational Fund filed.
1	Jan 5 1985		Brief amicus curiae of NAACP, et al. filed.
2	Jan 15 1985		CIRCULATED.
3	Feb 26 1985		ARGUED.

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No. A-990

IN THE

Supreme Court Of The United States

October Term, 1984

NELL HUNTER, et al, individually, and on behalf of all other members of Board of Registrars in the State of Alabama,
Appellants,

vs.

VICTOR UNDERWOOD and CARMEN EDWARDS, for themselves and all others similarly situated,
Appellees.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT
JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Pursuant to Rules 12 and 15 of the Rules of the Supreme Court of the United States, Appellants, Nell Hunter, et al, individually and on behalf of all other members of Board of Registrars in the State of Alabama, files this statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction to review the final judgment entered by the United States Court of Appeals for the Eleventh Circuit in this case and should exercise such jurisdiction herein.

QUESTIONS PRESENTED

I. Did the Court below err in holding that section 182 of the Alabama Constitution of 1901 violates on account of race the fourteenth amendment with respect to those convicted of crimes not punishable by imprisonment in the penitentiary?

II. Did the Court below err in failing to recognize the jurisdiction and authority conferred upon the State of Alabama by the Tenth Amendment to the United States Constitution to administer its electoral process, including the conditions under which the right of suffrage may be exercised?

III. Did the Court below err in failing to recognize the authority and jurisdiction conferred upon the State of Alabama to disfranchise those convicted of crimes involving moral turpitude pursuant to the "affirmative sanction" language in Section 2 of the Fourteenth Amendment to the United States Constitution?

IV. Did the Court below err in failing to recognize that the State of Alabama has an interest in disfranchising persons who are convicted of crimes involving moral turpitude, regardless of whether or not the crime is a felony or a misdemeanor and regardless of whether or not the crime is punishable by imprisonment in the penitentiary?

V. Did the Court below err in failing to find that section 182 of the Constitution of Alabama of 1901 was not adopted with the intent, and has not had the effect, of disfranchising proportionately more blacks than whites or in the alternative that the appellants demonstrated the existence of a permissible motive which led to the same result, that is an enactment of section 182 of the Constitution of Alabama of 1901?

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No. A-990

IN THE

Supreme Court Of The United States

October Term, 1984

NELL HUNTER, et al, individually, and on behalf of all other members of Board of Registrars in the State of Alabama,

Appellants,

vs.

VICTOR UNDERWOOD and CARMEN EDWARDS, for themselves and all others similarly situated,

Appellees.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit upon which this appeal is based appears in 730 F2d 614 (11th Cir. 1984) and is included in the Appendix, pp. A-1 to A-9.

The opinions of the United States Court of Appeals for the Fifth Circuit involving prior appeals and dispositions in this case appear in 604 F2d. 367 (5th Cir. 1979) and 622 F2d 1042 (5th Cir. 1980) and are included in the Appendix, pp. B-1 to B-4 and C-1.

The opinions from which the appellees eventually appealed to the United States Court of Appeals for the Eleventh Circuit and which were reversed by that Court are included in the Appendix, pp. D-1 to D-13 and E-1 to E-7.

GROUNDS OF JURISDICTION OF SUPREME COURT

This appeal arises from an action seeking to have declared unconstitutional on various grounds section 182 of the Alabama Constitution of 1901. The appellees succeeded in reversing the District Court and prevailing in the United States Court of Appeals for the Eleventh Circuit which held that section 182 of the Alabama Constitution of 1901 violates on account of race the Fourteenth Amendment to the United States Constitution with respect to those convicted of crimes not punishable by imprisonment in the penitentiary. The final judgment of the United States Court of Appeals for the Eleventh Circuit was entered on April 10, 1984. A timely notice of appeal was filed on July 2, 1984 in the United States Court of Appeals for the Eleventh Circuit. The jurisdiction of this Court is invoked under the provisions of 28 USC 1254 (2) in that a state constitutional provision was invalidated as repugnant to the United States Constitution, specifically the Fourteenth Amendment thereof.

Cases that sustain the jurisdiction of this Court include:

Detroit v. Murray Corp., 355 US 489 (1958)
Chicago v. Atchison, T. & S.F.R Co., 357 US 77 (1958)
United Gas Pipe Line Co. v. Ideal Cement Co., 369 US 134 (1962)
Dusch v. Davis, 387 US 112 (1967)
Bradford Electric Light Co. v. Clapper, 284 US 221 (1931)

CONSTITUTIONAL PROVISIONS INVOLVED

1. Sections 1 and 2 of the Fourteenth Amendment to the United States Constitution:

SECTION 1

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make

or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction equal protection of the laws."

SECTION 2

"Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for president and vice-president of the United States, representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state."

2. The Tenth Amendment to the United States Constitution:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

3. Section 182 of the Alabama Constitution of 1901:

"The following persons shall be disqualified both from registering, and from voting, namely:

All idiots and insane persons; those who shall by reason of conviction of crime be disqualified from voting at the time of the ratification of this Constitution; those who shall be convicted of treason, murder, arson, embezzlement, malfeasance in office, larceny, receiving stolen property, obtaining property or money under false pretenses, perjury, subordination of perjury, robbery, assault with intent to rob, burglary, forgery,

bribery, assault and battery on the wife, bigamy, living in adultery, sodomy, incest, rape, miscegenation, crime against nature, or any crime punishable by imprisonment in the penitentiary, or of any infamous crime or crime involving moral turpitude; also, any person who shall be convicted as a vagrant or tramp, or of selling or offering to sell his vote or the vote of another, or of buying or offering to buy the vote of another, or of making or offering to make a false return in any election of any person to any office, or of suborning any witness or registrar to secure the registration of any person as an elector."

STATEMENT OF THE CASE

This case was initiated when the appellees filed a complaint seeking to have declared unconstitutional section 182 of the Alabama Constitution of 1901 insofar as it applied to offenses carrying a penalty of one year or less, that is crimes not punishable by imprisonment in the penitentiary, and to enjoin its further application and for a preliminary injunction to have them, and the class they represented, restored to the voting lists in their respective county or to be allowed to register to vote in their respective county. In response, the appellants filed a Motion to Dismiss which raised, among other things, the following:

a. That the State of Alabama had an interest in disfranchising individuals who are convicted of crimes involving moral turpitude pursuant to Section 182 of the Alabama Constitution of 1901, regardless of the length, kind or place of confinement, that not being the standard or condition which gave rise to this State interest.

b. That the State of Alabama had a compelling state interest or in the alternative a rational basis for disfranchising those persons convicted of crimes involving moral turpitude, regardless of the length of sentence.

c. That section 2 of the Fourteenth Amendment to the United States Constitution either expressly allowed or ex-

empted from the operation of section 1 of the Fourteenth Amendment disfranchising provisions of state law such as section 182 of the Constitution of Alabama of 1901 and conferred upon the State of Alabama the authority to disfranchise moral turpitude misdemeanants.

In later motions and pleadings, the appellants additionally asserted as defenses the right under the Tenth Amendment to the United States Constitution to determine the conditions under which the right of suffrage may be exercised and the right to constitutionally exclude from the franchise those persons convicted of crimes involving moral turpitude.

The District Court, after an evidentiary hearing, overruled appellees' request for injunctive relief and granted the appellants' Motion to Dismiss. On appeal, this decision was reversed on a procedural ground not in any way connected with the merits. *Underwood v. Hunter*, 604 F2d 367 (5th Cir. 1979) (See Appendix – B-1 – B-4).

Thereafter, appellees again filed a Motion for Preliminary Injunction in the District Court seeking similar relief to that originally requested. While pending, the appellees filed a Notice of Interlocutory Appeal with the Fifth Circuit and a Motion for Injunction Pending Appeal, again in an effort to gain the opportunity to vote in some upcoming elections. The Motion for Preliminary Injunction was denied by the District Court, the Motion for Injunction Pending Appeal was denied by the Fifth Circuit and the appeal was decided adversely to the Appellees as the Fifth Circuit opined that the District Court properly denied the latest attempt for injunctive relief because Appellees failed to demonstrate that any irreparable harm would result if the injunction was not granted. *Underwood v. Hunter*, 622 F2d, 1042 (5th Cir. 1980), a copy of which is included in the Appendix as C-1.[1]

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[1]The opinion in *Underwood vs Hunter*, 622 F2d 1042 (5th Cir. 1980), which is found in the Appendix hereto as C-1 contains an excellent recital of the procedural history of this case through that appeal.

Language espoused in dealing with the issues involved is found in the second opinion in *Hunter*, supra., and is as follows:

> "Plaintiffs (appellees herein) failed to meet the second element, a showing of irreparable harm. Although each had been disfranchised for conviction of a crime involving moral turpitude, an individual in Alabama can have his right to vote restored if pardoned. ALA CODE §12-14-15, See §17-3-5. Victor Underwood was purged from the voting list of Jefferson County on April 30, 1977 for conviction of issuing a worthless check two and one-half to three years prior to the July 19, 1978 hearing on the initial preliminary injunction. Although officials of the Jefferson County Board of Registrars informed Underwood of the procedure for having his voting rights restored, he has made no effort to comply, nor has he alleged any difficulty in complying with this procedure. Carmen Edwards was purged from the voting list of Montgomery County pursuant to her conviction for the crime of issuing a worthless check in May 1978. Although she attempted to receive a pardon, for purposes of restoration of her voting rights, from the Mayor of Montgomery, she was told that she must wait at least a year. She has not sought a pardon since the waiting period has elapsed.
>
> Neither plaintiff, then, has presented any evidence which indicates that a proper application for a pardon would not have been granted. Under these circumstances, we cannot find that granting a Motion for Preliminary Injunction is either necessary or appropriate. . . ."

Subsequently, appellants Motion for Summary Judgment on Appellees' first three causes of action was granted. After a hearing on the remaining cause of action, specifically the appellees' fourth cause of action which alleged that section 182 of the Alabama Constitution of 1901 was enacted with intent to deprive blacks the right to vote, the District Court denied appellees any relief and found in favor of the appellants. However, this decision was reversed as reflected in the decision of *Underwood v. Hunter* contained in Appendix A hereto, the judgment from which the appellants now appeal.

Appellees first three causes of action can be summarized as follows: That the misdemeanors listed in section 182 as disfranchising offenses unconstitutionally infringe upon the franchise because they deny the franchise without a compelling state interest, that the misdemeanors listed in section 182 as disfranchising offenses denied appellees equal protection of the laws because more serious offenses are not disabling and that disfranchisement for conviction of a "crime involving moral turpitude" is based on a definition that is vague and indefinite and denies plaintiffs the right to register and to vote. As stated, the appellants' Motion for Summary Judgement as to these three causes of action was granted and although made a basis of the appellees' appeal to the Eleventh Circuit, these causes of action were not discussed by the Court below as it reached its decision on the basis of the appellees fourth cause of action. The fourth cause of action alleged that the list contained in section 182 was specifically adopted because of its supposed disproportionate impact on blacks with the intent to disfranchise blacks, thereby abridging the right to vote on the basis of race. After a hearing on this particular cause of action, the District Court ruled in favor of the appellants but this decision was reversed by the Court below.[2]

Two hearings were conducted in this case. The first was held in July of 1978 and the testimony adduced at that hearing related mainly to the first three causes of action. The evidence at that hearing revealed the following:

Various lists prepared either by the local District Attorney or the State Attorney General were used by the appellants in determining whether a certain crime had been found to involve moral turpitude as well as lists prepared by these offices outlining which crimes disqualified one from voting pursuant to section 182 of the Alabama Constitution of 1901. Testimony

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[2]The opinion of the District Court granting the appellants' Motion for Summary Judgment on the first three causes of action is found in the Appendix at D-1 — D-13.

The opinion of the District Court which was reversed by the Court below is found in the Appendix at E-1 — E-7.

revealed specifically that the appellants had the use of an Attorney General of Alabama's opinion which specifically opined that the crime of issuing worthless checks was one involving moral turpitude and therefore disqualifying under section 182 of the Alabama Constitution of 1901, that crime being the one for which the named appellees were convicted. Further testimony revealed that if a crime was not in any of these lists, the local District Attorney's office or the Attorney General's office would be consulted to determine whether the crime was disqualifying.

Appellee Underwood, who is white, was purged from the voting list in Jefferson County, Alabama because of his conviction of the crime of issuing a worthless check. He had been convicted of this crime some two and one-half to three years prior to July of 1978 and had been purged from the voting list in May of 1977. To this date, he has not sought his statutory right and remedy of a pardon which would restore to him the right to vote, although he was aware of the same since May of 1977.

Concerning named appellee Carmen Edwards, she had been convicted in the Montgomery City Court for the crime of issuing a worthless check in May of 1978. Her testimony revealed that she was notified that she would have to wait one year before she could apply to obtain a pardon and therefore the right to vote. As in the case of Underwood, she has refused to utilize this simple procedure.

The second hearing in this case involved the previously explained fourth cause of action. The crux of this hearing involved testimony by expert witnesses from both sides, the appellants' expert being J. Mills Thorton, III, a professor of Southern History at the University of Michigan. It was the contention of the State of Alabama at this hearing, as buttressed and amplified by the testimony of Thornton, that section 182 of the Alabama Constitution of 1901 was passed for political reasons, that it was passed with the intent to disfranchise whites

as well as blacks, a brief summary of this testimony being as follows.

According to Dr. Thorton, the purpose of the Alabama Constitutional Convention of 1901 in adopting section 182, was *political,* i.e. to repel the populist revolt and to make it impossible for the Democratic party in Alabama to be again challenged. In Thornton's opinion, the passage of section 182 was part and parcel and in furtherance of this avowed *political* purpose of the convention. Since the populists were made up of predominently poor whites, and the Democratic party predominently of rich and conservative whites, the blacks became the block of votes that would decide which party's candidates got elected. Therefore, according to Thornton, the following was abundantly clear:

That the disfranchisement of poor whites was an equally important intention and motive of the delegates to the Constitutional Convention of 1901 and the drafters of the Constitutional provisions resulting from the convention as was the disfranchisement of blacks.[3] Section 182 of the Constitution of Alabama of 1901 was part of the plan, purpose and intention of the delegates to the convention, according to Thornton, to prevent and disfranchise poor whites as well as blacks, for political reasons.

In support for this opinion, Thornton cited various pieces of documentary evidence, articles or written materials published shortly after the Convention, the inner play and applicability of other sections passed by the Constitutional Convention which demonstrated that section 182 applied with equal force and effect and with the purpose to disfranchise poor whites as well as blacks, e.g. section 178, 180 and 194 of

[3]In the decision of the Court below, it is held that the appellants did not advance the denial of the franchise to poor whites as a permissible purpose under the second prong of the test announced in *Village of Arlington Heights v. Metropolitan Developing Corp.,* 429 US 252 (1977). However, it is more than obvious from the above testimony of Thornton that the appellants did introduce evidence in support of their theory that the denial of the vote to poor whites was a permissible motive for the enactment of section 182.

the Constitution of Alabama of 1901, sections 178 and 194 being poll tax provisions, which had the effect of disfranchising more whites than blacks, and finally the fact that section 182 was hardly debated or mentioned at all at the convention, a fact recognized and agreed to by the Court below. The scant reference to section 182 at the Convention, according to Thornton, was because Alabama's prior constitution, that being the Constitution of 1875, already had a provision that provided for the disfranchisement of any one convicted of a crime which resulted in imprisonment in the penitentiary. Section 182 of the Alabama Constitution of 1901 repeated this phrase and then added a long list of crimes. However, each crime listed carried a punishment upon conviction of imprisonment in the penitentiary. Therefore, this listing was unnecessary because these crimes were all included in the general phrase of disfranchisement for conviction of crimes resulting in imprisonment in the penitentiary. However, according to Thornton, they were added because the white public associated these crimes with blacks and the behavior of blacks to commit such crimes. This, according to Thornton, was an obvious factor that section 182 was not passed for the sole purpose of disfranchising blacks because, as explained, the Constitution of 1875, although phrased differently, already provided for disfranchisement for the conviction of the same type crimes.

Finally, Dr. Thornton testified and emphasized that in reading the proceedings of the Constitutional Convention of 1901 a person should not be mislead. The theme of the speeches and debates is to disfranchise blacks and not to disfranchise any whites. However, Thornton cautions that this is misleading and false and was intended only as a public relations ploy in order to convince the white electorate that they should vote for the articles adopted by the Convention because, in reality, after the expiration of the temporary plan, contained in sections 180 and 181, which would only last 13 months, the entire suffrage article *had the intention to disenfranchise poor whites equally as well as blacks.*

The importance of Thornton's testimony on this appeal is

two-fold. First of all, it demonstrates that section 182 was not passed with the intention to disfranchise blacks or concomitantly, even if one were to conclude that it was, that there was another and permissible motive, the disfranchisement of poor whites as well, not to mention the permissible motive of the State having the right and interest to disfranchise those convicted of moral turpitude crimes.

The appellants raised at the second hearing held in this cause, which was held in July of 1981, the defense that section 182 was not passed with the intent to disfranchise blacks or alternatively that, as explained through the testimony of Dr. Thornton, there was another and permissible motive for the enactment of this provision, not to mention again the right to the State pursuant to the Tenth Amendment and the Fourteenth Amendment to disfranchise those convicted of crimes involving moral turpitude. These issues received favorable treatment from the District Court but received unfavorable treatment in the Court below.

Before closing it is imperative to note the following. All the crimes listed in section 182 which are not punishable by imprisonment in the penitentiary, and which are still viable, involve moral turpitude. See Appendix D-8. Therefore, one can only be disfranchised in Alabama if he is convicted of a felony or a non-felony, i.e. a crime not punishable by imprisonment in the penitentiary, involving moral turpitude. The issue then becomes whether the state can disfranchise persons convicted of moral turpitude crimes, those being the still viable crimes added by the drafters of section 182.

SUBSTANTIALITY OF FEDERAL QUESTIONS

This lawsuit was initially filed in June of 1978. After three opinions from federal appellate courts and untold amounts of time, effort and paper arguing the relative positions of the parties, one fact remains consistently and continually clear: This case involves serious and important federal questions.

It cannot be gainsaid that the Tenth Amendment to the

United States Constitution leaves unequivocally to the States the right to administer the electoral process and to set qualifications and conditions upon the exercise of the franchise. *Pope vs Williams*, 93 US 622 (1904). There can be no argument that:

> ". . . to be sure, the administration of the electoral process is a matter that the Constitution largely entrusts to States. . . ."

Kusper v. Pontikes, 414 US 51 (1933)

It is suggested that at no time, despite frequent opportunity to do so, has this Court ever undermined or weakened this power left specifically to the States by the Tenth Amendment. Quite to the contrary, when given the opportunity, this Court has written sweeping and persuasive comments concerning the power of a state to control their elections, e.g. *Lassiter vs North Hampton County Board of Elections*, 360 US 45 (1959) and *Oregon vs Mitchell*, 400 US 112 (1970). Importantly enough, for purposes of this appeal, this Court has even specifically written to the point that in controlling elections, the state may consider the criminal record of those who vote at its elections. We submit the following from *Lassiter*, supra.:

> ". . . we do not suggest any standards which a State desires to adopt may be required of voters. *But there is a wide scope of exercise of its jurisdiction.* Resident requirements, age, *previous criminal record*, . . . are obvious examples indicating factors which a State may take into consideration in determining the qualifications of voters. . . ." (citations omitted) (emphasis supplied)

Lassiter v North Hampton Board of Elections, supra. 3 L.Ed.2d 1072 at page 1077.

The opinion of the Court below has the effect of conflicting and interfering with these previous pronouncements of this Court. Section 182 of the Constitution of Alabama of 1901 allows disfranchisement for felonies and for crimes involving moral turpitude, whether felonies or not. This certainly seems to be a restriction within the realm of authority and jurisdiction left to the States by the Tenth Amendment and as re-

inforced by this Court in the decisions cited above. To elect to disfranchise non-felons who commit crimes involving moral turpitude is certainly within the sphere contemplated by the Tenth Amendment, it being obvious that in determining an individual's previous criminal record, the State may attach more significance to crimes involving moral deprivatity or baseness, for such a distinction does not offend the equal protection clause of the Fourteenth Amendment. See *Oregon vs. Mitchell,* 400 US 117 (1970).

The decision of the Court below violates the Tenth Amendment right of the State of Alabama to control its elections and to set the qualifications for its voters. To hold otherwise would destroy the complicated fabric woven by the framers of the United States Constitution and ratified by this Court in dealing with matters left to the States for consideration or ones in which the State's interest must succumb to that of the Federal Government.

Yet still another important and substantial federal question involves the Fourteenth Amendment to the United States Constitution. This analysis is based upon this Court's decision in *Richardson vs Ramirez,* 418 US 24 (1974). It is submitted that the rationale espoused in that case allows the State of Alabama the right to constitutionally disfranchise misdemeanants pursuant to section 2 of the Fourteenth Amendment as the "affirmative sanction" language in that section does not specify felonies only but refers rather to "other crimes." A close study of the *Ramirez* opinion demonstrates that the legislative intention was not to limit section 2 of the Fourteenth Amendment to felonies only but rather to have it apply to "other crimes".

This obvious sentiment is expressly seen in the following language from *Ramirez:*

> ". . . the legislative history bearing on the meaning of the relevant language of section 2 is scant, indeed; the framers of the Amendment were primarily concerned with the effect of reduced representation on the States, rather than the two forms of disfranchisement which were ex-

> empted from that consequence by the language which we are concerned here. *Nonetheless, what legislative history there is indicates that this language was intended by Congress to mean what it says.*" (emphasis supplied)

Richardson vs Ramirez, 418 US 24, 43 (1974).

Further, other portions of *Ramirez,* supra., illustrate that this decision is clear authority for the proposition that a State may disfranchise some individuals that have committed crimes carrying a maximum punishment of less than twelve months incarceration and not others. The recognition of the propriety of such is seen in this explanation by Mr. Justice Rehnquist:

> ". . . Although the Court has never given plenary consideration to the precise question of whether a State may constitutionally exclude some or all convicted felons from the franchise, we have indicated approval of such exclusions on a number of occasions. In two cases decided toward the end of last century, the Court approved exclusions of bigamists and polygamists from the franchise under territorial laws of Utah and Idaho . . . Much more recently we have strongly suggested in dicta that exclusion of convicted felons from the franchise violates no constitutional provision. *In Lassiter vs North Hampton County Board of Elections,* . . . where we upheld North Carolina's imposition of a literacy requirement for voting, the Court said 'resident requirements, age, previous criminal record, . . . are obvious examples indicating factors which a state may take into consideration in determining the qualifications of voters.' "

Richardson vs Ramirez, supra., 418 US 24 at page 53.

An obvious conflict appears for this Court to decide. The Court below concluded that section 182 violated section 1 of the Fourteenth Amendment to the United States Constitution. However, it is submitted by the State of Alabama that it has the right, pursuant to section 2 of the Fourteenth Amendment, to disfranchise those convicted of moral turpitude misdemeanors. If this is so, then the Court below erred in its holding. While not admitting that the framers of section 182 had the intention to discriminate against blacks, even if this was

the case, the State of Alabama, pursuant to Section 2 of the Fourteenth Amendment, would have the authority to still disfranchise moral turpitude misdemeanants. This Court's reliance on *Lassiter*, supra., and especially the language from that case recognizing the ability of the State to consider previous criminal record in deciding the qualifications of voters, in reaching a decision in *Ramirez*, supra., suggests that the State of Alabama cannot be condemned for what happened in this case.

Moreover, it is the additional contention of the State of Alabama that it has a compelling interest in disfranchising those who commit crimes involving moral turpitude, regardless of the length of punishment for the commission of such a crime. Consequently, the reason for the passage of section 182 would make no difference, the State not admitting in advance such an argument that section 182 was passed with any discriminatory intent. In this regard, we would direct this Court to *Kronlund vs Honstein*, 327 F Supp 71 (N.D. GA 1971). In that case, the plaintiff attacked a section of the Georgia Constitution on the ground that it unconstitutionally deprived her of rights guaranteed by the equal protection clause of the Fourteenth Amendment and by the First and Eighth Amendment to the Constitution. The provision in issue there, section 2-801 of the Georgia Constitution, disqualified those from voting who had been convicted of certain listed crimes or of any crime involving moral turpitude punishable by imprisonment in the penitentiary. Plaintiff had been convicted of smuggling heroin into the United States, a crime determined by the District Court to involve moral turpitude.

The *Kronlund* Court rejected plaintiff's contention that the provision was unconstitutional on its face and as applied to her. The Court recognized that a State may constitutionally disfranchise otherwise qualified voters because they have been convicted of a felony. However, the *Kronlund* Court went further and found that disfranchising only those convicted of moral turpitude crimes and not those convicted of non-moral turpitude crimes served a compelling state interest. In so hold-

ing that Georgia had a compelling State interest in disfranchising those convicted of crimes involving moral turpitude, the Court noted as follows:

> "A State has an interest in preserving the integrity of her electoral process by removing from the process those persons with proven anti-social behavior, whose behavior can be said to be destructive of society's aims. For this reason, a State may prohibit idiots and insane persons as well as those convicted of certain offenses from participating in her elections. A State may also legitimately be concerned that persons convicted of certain crimes may have a greater tendency to commit election offenses. Therefore, Georgia has a compelling State interest sufficient to justify the voting restrictions set forth in section 2-801 of the Georgia Constitution. Since the State does have this legitimate interest to protect, this provision does not unjustifiably abridge the plaintiff's First Amendment rights."

Krolund vs Honstein, supra., 327 F Supp 71, at page 73.

The State would be remiss in advancing this argument not to mention the very important case of *Washington vs State*, 75 Ala. 582 (1884). In that case, the Alabama Supreme Court, in a racially neutral context, this occurring some seventeen years before the Constitutional Convention of 1901, recognized that the State had an interest in disfranchising those who had been convicted of a crime involving moral turpitude. As stated by the Court,

> ". . . The presumption is that one rendered infamous by conviction of a felony or other base offense indicative of great moral turpitude is unfit to exercise the privilege of suffrage, or to hold office, upon terms of equality with free men who are clothed by the State with a toga of political citizenship. . . ."

Washington vs State, 75 Ala. 582, 585 (1884)

Consequently, again without admitting that the framers of the Alabama Constitution of 1901 had a discriminatory intent in passing section 182, it would make no difference what their intentions were because section 182 merely fulfilled a valid

State interest, that is disfranchising those that have been convicted of crimes involving moral turpitude.

Finally, the Court below failed to recognize the existence of permissible motives for the enactment of section 182 thereby allowing a State constitutional provision over eighty years in age to be stricken. The court below has incorrectly interpreted this Court's decisions and as a result his unconstitutionally applied the Fourteenth Amendment to reach an erroneous result.

As already noted, the State has the right pursuant to the Tenth and the Fourteenth Amendment to disfranchise those who commit crimes involving moral turpitude regardless of the length of confinement. These constitutional provisions serve as more than ample authority for permissible motives by the State of Alabama in enacting section 182. It is incongruous and lacking in logic to state on one hand that the State has the right to disfranchise those who commit crimes involving moral turpitude but to ignore this right when one alleges that the vehicle for such disfranchisement was passed based upon an impermissible motive.

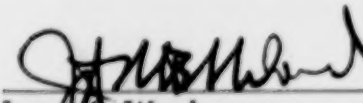
Moreover, the above referred to testimony of Dr. Thornton suggests yet more permissible motives for the passing of section 182. This testimony is clear that this section was passed for political purposes or with the purpose to disfranchise poor whites equally with blacks. A reading of his testimony makes this clear and the Court below erred by stating that this permissible motive was never advanced by the appellants.

Consequently, either because of the State's constitutional interests or because of the testimony adduced from the expert Thornton, the State demonstrated that section 182 would have passed even in the absence of any alleged racial motive. See *Mount Healthy City School District Board of Education vs. Doyle*, 429 US 274 (1977). Therefore, the District Court below erroneously voided as repugnant to the United States Constitution section 182 of the Alabama Constitution of 1901.

CONCLUSION

For the reasons stated above, appellants submit that this appeal brings before the Court substantial and important federal questions which require plenary consideration with briefs on the merits and oral argument for their resolution.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, James S. Ward, a member of the Bar of the Supreme Court of the United States and counsel of record of Nell Hunter, et al, individually and on behalf of all other members of Board of Registrars in the State of Alabama, appellants herein, hereby certify that on July 9, 1984, pursuant to Rule 33, Rules of the Supreme Court, I served three copies of the foregoing Jurisdictional Statement on each of the parties herein as follows:

On Victor Underwood and Carmen Edwards, for themselves and all others similarly situated, appellees herein, by depositing such copies in the United States Post Office, Birmingham, Alabama, with first class postage prepaid, properly addressed to the post office address of Edward Still and Neil Bradley, the above named appellees counsel of record, at Edward Still, Suite 400, Commerce Center, 2027 First Avenue North, Birmingham, Alabama 35203 and Neil Bradley, ACLU Foundation, 52 Fairlie Street NW, Atlanta, Georgia 30303.

On the Solicitor General, Department of Justice, by depositing such copies in the United States Post Office, Birmingham, Alabama, with first class postage prepaid, properly addressed to the post office address of The Solicitor General, Department of Justice, Washington, D.C. 20530.

On William Bradford Reynolds, Assistant Attorney General, Charles J. Cooper, Deputy Assistant Attorney General, and Brian K. Landsberg, Esquire, by depositing such copies in the United States Post Office, Birmingham, Alabama with first class postage prepaid, properly addressed to the post office address of William Bradford Reynolds, Assistant Attorney General, Charles J. Cooper, Deputy Assistant Attorney General and Brian K. Landsberg, Esquire, United States Department of Justice, Washington, D.C. 20530.

All parties required to be served have been served.

Dated: July 9, 1984

James S. Ward
Special Assistant Attorney General
Attorney for Appellants

AFFIDAVIT OF SERVICE

STATE OF ALABAMA)

JEFFERSON COUNTY)

I, James S. Ward, depose and say that I am an attorney in the law firm of Ward & McKnight and I am the attorney of record for Nell Hunter, et al, individually and on behalf of all other members of Board of Registrars in the State of Alabama, the appellants herein, and that on 9 day of July, 1984, pursuant to Rule 33, Rules of the Supreme Court, I served three copies of the foregoing Jurisdictional Statement on each of the parties required to be served herin, as follows:

On Victor Underwood and Carmen Edwards, for themselves and all others similarly situated, appellees herein, by depositing such copies in the United States Post Office, Birmingham, Alabama, with first class postage prepaid, properly addressed to the post office address of Edward Still and Neil Bradley, the above named appellees counsel of record, at Edward Still, Suite 400, Commerce Center, 2027 First Avenue North, Birmingham, Alabama 35203 and Neil Bradley, ACLU Foundation, 52 Fairlie Street NW, Atlanta, Georgia 30303.

On the Solicitor General, Department of Justice, by depositing such copies in the United States Post Office, Birmingham, Alabama, with first class postage prepaid, properly addressed to the post office address of The Solicitor General, Department of Justice, Washington, D.C. 20530.

On William Bradford Reynolds, Assistant Attorney General, Charles J. Cooper, Deputy Assistant Attorney General, and Brian K. Landsberg, Esquire, by depositing such copies in the United States Post Office, Birmingham, Alabama with first class postage prepaid, properly addressed to the post office address of William Bradford Reynolds, Assistant Attorney General, Charles J. Cooper, Deputy Assistant Attor-

ney General and Brian K. Landsberg, Esquire, United States Department of Justice, Washington, D.C. 20530.
All parties required to be served have been served.

James S. Ward
Special Assistant Attorney General
Attorney for Appellants

Sworn to and subscribed before
me this the 9 day of July, 1984.

Notary

APPENDICES

APPENDIX A

Opinion Below

Victor UNDERWOOD and Carmen Edwards, for themselves and all others similarly situated, Plaintiffs-Appellants.

v.

Nell HUNTER, et al.,
Defendants-Appellees.

No. 82-7011.

United States Court of Appeals,
Eleventh Circuit.

April 10, 1984.

Plaintiffs who were barred from representation on election rolls filed suit against counties' boards of registrars under sections 1981 and 1983 challenging, as discriminatory, state constitutional section under which they were disfranchised. The United States District Court for the Northern District of Alabama, Frank H. McFadden, J., entered judgment in favor of plaintiffs on two of five causes of action, and plaintiffs appealed. The Court of Appeals, Vance, Circuit Judge, held that state constitutional section disfranchising those convicted of, inter alia, crimes of moral turpitude violated the Fourteenth Amendment by denying plaintiffs' right to vote on basis of race.

Reversed and remanded with instructions.

1. Elections

A successful Fourteenth Amendment claim of race discrimination in matters affecting voting requires that plaintiffs establish an intent to abridge the franchise on account of race. U.S.C.A. Const. Amend. 14.

2. Constitutional Law

In a case alleging discrimination on basis of race, permissible motivating interest articulated by the state must be com-

pelling, and means employed must be precisely drawn to accomplish exactly objective that state purports to further.

3. Federal Courts

On review, district court's findings of fact are entitled to be respected unless they are clearly erroneous.

4. Federal Courts

Under clearly-erroneous standard, lower court's findings of fact shall stand unless reviewing court is left with definite and firm impression that mistake has been made.

5. Federal Courts

Clearly-erroneous standard of review applies to findings of both subsidiary and ultimate fact.

6. Federal Courts

Questions of law are subject to independent review, and findings made under an erroneous review of law may be set aside on that basis.

7. Constitutional Law

Plaintiffs, who were barred from representation on election rolls pursuant to state constitutional section disfranchising those convicted of, inter alia, crimes of moral turpitude, met burden of showing that the section was specifically adopted with intent to disfranchise blacks on account of their race, and state failed to meet burden to demonstrate that the section would still have been adopted had a permissible state reason been the sole consideration; therefore, the section violated the Fourteenth Amendment by denying plaintiffs' right to vote on basis of race. U.S.C.A. Const.Amend. 14; Ala.Const. § 182.

Appeal from the United States District Court for the Northern District of Alabama.

Before TJOFLAT, VANCE and CLARK, Circuit Judges.

VANCE, Circuit Judge:

In 1977 and 1978 the boards of registrars for Montgomery and Jefferson Counties in Alabama barred Carmen Edwards

and Victor Underwood, respectively, from representation on the election rolls. They were denied voting privileges under section 182 of the Alabama Constitution, adopted in 1901, which disfranchises those convicted of crimes punishable by imprisonment in the penitiary, crimes of moral turpitude and other enumerated misdemeanors and felonies.[1] Edwards and Underwood were disfranchised for presenting worthless checks, a misdemeanor which the registrars classify as a crime of moral turpitude.[2]

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[1]Section 182 of the Alabama Constitution of 1901 provides:

> The following persons shall be disqualified both from registering, and from voting, namely:
>
> All idiots and insane persons, those who shall be reason of conviction of crime be disqualified from voting at the time of the ratification of this Constitution; those who shall be convicted of treason, murder, arson, embezzlement, malfeasance in office, larceny, receiving stolen property, obtaining property or money under false pretenses, perjury, subordination of perjury, robbery, assault with intent to rob, burglary, forgery, bribery, assault and battery on the wife, bigamy, living in adultery, sodomy, incest, rape, miscegenation, crime against nature, or any crime punishable by imprisonment in the penitentiary, or of any infamous crime or crime involving moral turpitude; also, any person who shall be convicted as a vagrant or tramp, or of selling or offering to sell his vote or the vote of another, or of buying or offering to buy the vote of another, or of making or offering to make a false return in any election by the people or in any primary election to procure the nomination or election of any person to any office, or of suborning any witness or registrar to secure the registration of any person as an elector.

[2]In determining whether an offense is a crime of moral turpitude, the registrars follow Alabama case law and, in the absence of judicial decision, opinions of the state attorney general. The registrars' actions in this case were based on opinions of the attorney general. In *Pippin v. State*, 197 Ala. 613, 73 So. 340 (1916), the Alabama Supreme Court defined a crime of moral turpitude as an act that is " 'immoral itself, regardless of the fact whether it is punishable by law. The doing of the act itself, and not its prohibition by statute, fixes the moral turpitude.' " *Id.* at 616. 73 So. at 342 (quoting *Fort v. City of Brinkley*, 87 Ark. 400, 112 S.W. 1084 (1908))). The attorney general in opinion has acknowledged that the classification of presently unaddressed offenses "will turn upon the moral standards of the judges who decide the question." Pl.Exh. 3; *see also infra* note 13. "Thus does the serpent of uncertainty crawl into the Eden of trial administration." McCormick, *McCormick on Evidence* § 43, at 85-86 (2d ed. 1972).

Edwards and Underwood filed suit against the boards of registrars of Montgomery and Jefferson Counties under 42 U.S.C. §§ 1981 and 1983 challenging section 182 as it applies to those convicted of crimes not punishable by imprisonment in the penitentiary (nonprison offenses). They alleged five causes of action, one of which is dispositive. Plaintiffs alleged that the nonprison offenses warranting disfranchisement under section 182 were specifically adopted with the intent to disfranchise blacks on account of their race and that the provision has had exactly its intended effect.[3] They requested a declaration invalidating section 182 and sought to enjoin its future application. With respect to the two claims proceeding to trial, the district court certified a plaintiff class of those disfranchised for nonprison offenses, represented by Underwood and Edwards,[4] and a defendant class of all Alabama county boards of registrars. Following trial in 1981, the district court issued

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[3]Plaintiffs also alleged: (1) that the section denies the franchise to plaintiffs without a compelling state interest in contravention of the first, fifth and fourteenth amendments; (2) that the section denies plaintiffs equal protection of the laws because more serious crimes are not disabling; (3) that the term "crime involving moral turpitude" is unconstitutionally vague; and (4) that the suffrage provisions of the 1901 Alabama Constitution are stricter than those of the 1868 Constitution, in violation of the Act of Readmission, Act of June 25, 1868, ch. 70, 15 Stat. 73.

Before plaintiffs amended their complaint to add the Readmission Act claim, the district court granted summary judgment for the registrars on the first three causes and dismissed the race discrimination claim for failure to state a claim upon which relief could be granted. We reversed and remanded for further proceedings. *Underwood v. Hunter*, 604 F.2d 367 (5th Cir. 1979). During subsequent discovery plaintiffs moved for a preliminary injunction premised on the first three theories so that they could vote in the 1980 primaries and general election. We affirmed the order of the district court denying relief because we concluded that plaintiffs had not shown any prospect of irreparable harm. *Underwood v. Hunter*, 622 F.2d 1042 (5th Cir. 1980). After the first three claims were again dismissed by the trial court, the Readmission Act claim proceeded to trial with the race discrimination claim.

[4]Edwards is black and Underwood is white. From the record of the proceedings below it appears that for purposes of the race discrimination claim the trial court treated Edwards as the representative of a subclass of blacks disfranchised by virtue of conviction of nonprison offenses.

a memorandum opinion ruling for defendants on these two causes of action. Plaintiffs filed this appeal challenging the disposition of all five claims. We hold that section 182 violates the fourteenth amendment because it denies plaintiffs the right to vote on the basis of race.[5]

[1, 2] A successful fourteenth amendment claim of race discrimination in matters affecting voting requires that plaintiffs establish an intent to abridge the franchise on account of race. *City of Mobile v. Bolden*, 446 U.S. 55, 66-67, 100 S.Ct. 1490, 1499-1500, 64 L.Ed.2d 47 (1980) (plurality opinion); *Washington v. Davis*, 426 U.S. 229, 240, 96 S.Ct. 2040, 2047-48, 48 L.Ed.2d 597 (1976). To establish a violation of the fourteenth amendment in the face of mixed motives, plaintiffs must prove by a preponderance of the evidence that racial discrimination was a substantial or motivating factor in the adoption of section 182. They shall then prevail unless the registrars prove by a preponderance of the evidence that the same decision would have resulted had the impermissible purpose not been considered. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 270 & n. 21, 97 St.Ct. 555, 566 & n. 21, 50 L.Ed.2d 450 (1977); *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 287, 97 S.Ct. 568, 576, 50 L.Ed.2d 471 (1977). In a case alleging discrimination on the basis of race, the permissible motivating interest articulated by the state must be

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[5]The registrars argue that mootness and failure to exhaust administrative remedies bar us from reaching the merits. Exhaustion of administrative remedies, however, is not a prerequisites to the bringing of this action under 42 U.S.C. § 1983. *Patsy v. Board of Regents*, 457 U.S. 496, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982). The charge of mootness lacks support. In 1980 the office of the state attorney general issued an opinion letter declaring that convictions under municipal ordinances would not warrant disfranchisement. Def.Exh. 2. The registrars argue on the basis of this directive that Edwards might now qualify for registration because worthless check writing is a violation of both city ordinance and state statute. They have adduced no proof that Edwards was convicted of a municipal offense alone and in the meantime they have not offered to reverse their original decision barring registration. We therefore discern nothing that in any way extinguishes Edwards' claim.

compelling, *Crawford v. Board of Education*, 458 U.S. 527, 536, 102 S.Ct. 3211, 3217, 73 L.Ed.2d 948 (1982), and the means employed must be precisely drawn to accomplish exactly the objective that the state purports to further. *Kramer v. Union Free School District*, 395 U.S. 621, 632, 89 S.Ct. 1886, 1892, 23 L.Ed.2d 583 (1969).

The district court found that plaintiffs failed to show evidence of discriminatory purpose in the adoption of section 182. It next concluded that even if a racial animus was demonstrated, the state's purported interest in denying criminals the the franchise is a permissible one.

[3-6] We cannot agree with the district court. Our review of the record reveals that the district court erred both in its factual findings and in its legal analysis.[6] We conclude that the district court's finding of lack of discriminatory intent in the adoption of section 182 is clearly erroneous. In addition, the district court failed to require the state to show that section 182 would have been enacted in the same form in the absence of racial animus, as *Arlington Heights* requires. By allowing the state to prevail on what the district court concluded was a showing of permissible intent, the court brought its inquiry to a premature end.[7]

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[6]On review the district court's findings of fact are entitled to be respected unless they are clearly erroneous. *Hardin v. Stynchcomb*, 691 F.2d 1364, 1372 (11th Cir. 1982). Under the clearly erroneous standard, the lower court's findings of fact shall stand unless the reviewing court is left with the definite and firm impression that a mistake has been made. *American National Bank v. Federal Deposit Insurance Corp.*, 710 F.2d 1528, 1533-34 (11th Cir. 1983). This standard of review applies to findings of both subsidiary and ultimate fact. *Pullman-Standard v. Swint*, 456 U.S. 273, 287, 102 S.Ct. 1781, 1789, 72 L.Ed.2d 66 (1982); *American Civil Liberties Union v. Rabun County Chamber of Commerce, Inc.*, 698 F.2d 1098, 1110 (11th Cir. 1983). Questions of law are subject to independent review, and findings made under an erroneous view of the law may be set aside on that basis. *Pullman-Standard*, 456 U.S. at 287, 102 S.Ct. at 1789.

[7]The court held that plaintiffs would not have prevailed even if they had shown discrimination because the court discerned a permissible reason for restricting the franchise of criminals. Citing *Palmer v. Thompson*, 403 U.S. 217, 91 S.Ct. 1940, 29 L.Ed.2d 438 (1971), and the plurality

Applying the *Arlington Heights* test to the case at hand, the first step is to inquire whether intent to deny the franchise on the basis of race was a substantial or motivating factor in the enactment of 182. In conducting this inquiry we are mindful of the testimony by expert witnesses for both sides

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opinion in *Michael M. v. Superior Court*, 450 U.S. 464, 101 S.Ct. 1200, 67 L.Ed.2d 437 (1981), the district court ruled that "an impermissible motive standing alone will not invalidate legislation for which there is a permissible basis."

The lower court's reliance on *Michael M.* is misplaced. In *Michael M.*, Justice Rehnquist, writing for a plurality of the Court, quoted *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), to the effect that the existence of an illicit legislative motive does not *automatically* result in a conclusion of unconstitutionality. 450 U.S. at 472 n. 7, 101 S.Ct. at 1205-06 n. 7. The plurality proceeded to cite the burden-shifting test announced in note 21 of *Arlington Heights*, signifying that discriminatory intent *will* defeat a statute where the state is unable to demonstrate that the same result would have occurred solely in light of a permissible motive.

We do not read *Palmer* to the contrary. In *Arlington Heights* the Court cited *Palmer* as support for the proposition that a plaintiff need not necessarily prove that racial discrimination was the sole motivating factor in order to prevail:

> *Davis* does not require a plaintiff to prove that the challenged action rested solely on racially discriminatory purposes. Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the "dominant" or "primary" one.[11]
>
> [11]In *McGinnis v. Royster*, 410 U.S. 263, 276-277, 93 S.Ct. 1055, 1063, 35 L.Ed.2d 282 (1973), in a somewhat different context, we observed: "The search for legislative purpose is often elusive enough, *Palmer v. Thompson*, 403 U.S. 217, 91 S.Ct. 1940, 29 L.Ed.2d 438 (1971), without a requirement that primacy be ascertained. Legislation is frequently multipurposed: the removal of even a 'subordinate' purpose may shift altogether the consensus of legislative judgment supporting the statute."

429 U.S. at 265 & n. 11, 97 S.Ct. at 563 & n. 11. In light of this passage, we conclude that *Arlington Heights* supersedes any dicta which *Palmer* might contain to the effect that a permissible purpose will always defeat an impermissible motive. *See also Washington v. Davis*, 426 U.S. at 242-43, 96 S.Ct. at 2048-49 (*Palmer* "did not involve, much less invalidate, a statute or ordinance having neutral purposes but disproportionate racial consequences"); Note, *Making the Violation Fit the Remedy: The Intent Standard and Equal Protection Law*, 92 Yale L.J. 328, 330 (1982).

that the purpose of section 182 must be considered in light of the overall purpose of the 1901 constitutional convention and the suffrage article, taken as a whole.

Blacks first received the right to vote in Alabama under the Constitution of 1867, which created universal suffrage for males over the age of twenty-one with certain exceptions not relevant here. Ala. Const. of 1867, art. VII. With the end of Reconstruction, the white citizens of Alabama moved to reassert their once unquestioned political supremacy. The 1890's ushered in an era of disfranchisement not only in Alabama but throughout the South. In 1890 Mississippi adopted a new state constitution embodying the suffrage restrictions proposed in the "Second Mississippi Plan." By 1908 eleven other states, including Alabama, had followed suit through various statutory and constitutional devices. S. Hackney, *Populism to Progressivism in Alabama* 147 (1969); C. Woodward, *Origins of the New South 1877-1913* 321 (1971).

In the judgment of modern scholars, the organizers of the 1901 Alabama convention sought to disfranchise poor dissident whites as well as blacks. M. McMillan, *Constitutional Development in Alabama, 1798-1901: A Study in Politics, the Negro, and Sectionalism* 249, 269 (1955) (Def.Exh. 14). With the ascendency of the Populists a decade earlier, the black vote had acquired added leverage. Whites, Democrats and Populists alike, vied for black ballots in any way they could, with favors, pardons of convictions, outright vote purchase and massive electoral fraud. *United States v. State of Alabama,* 252 F.Supp. 95, 98 (M.D.Ala.1966) (three-judge court); S. Hackney, *supra,* 36-37, 89, 176-77. As the court below noted, resort to such methods had become increasingly precarious in light of renewed Northern moves to extend the federal election supervisory act of 1870. In 1890 the Senate had narrowly defeated the Lodge force bill, which called for tighter federal control of all phases of voting, from voter registration to ballot tabulation. J. Kousser, *The Shaping of Southern Politics* 29-30 (1974); C. Woodward, *supra,* at 254-55. The most effective way to ward off federal intervention as well as fraud, accord-

ing to the reformers, was to eliminate the Negro vote. S. Hackney, *supra,* at 146, 175-77; M. McMillan, *supra,* at 269; C. Woodward, *supra,* at 326-27. In the words of one delegate to the 1901 convention, "Now we are not begging for 'ballot reform' or anything of that sort, but we want to be relieved of purchasing the Negroes to carry elections. I want cheaper votes." Speech of Delegate William A. Handley, III *Official Proceedings of the Constitutional Convention of the State of Alabama, May 21st, 1901 to September 3rd, 1901* 2276-77 (1940) [hereinafter cited as *Official Proceedings*].

When the Alabama constitutional convention assembled in May 1901, the question was not whether to disfranchise the Negro but rather how to do so constitutionally. In his opening address John B. Knox, the president of the convention, declared:

> And what is it that we want to do? Why it is within the limits imposed by the Federal Constitution,. to establish white supremacy in this State.

I *Official Proceedings* at 8; *see also Journal of the Proceedings of the Constitutional Convention of the State of Alabama* 1776 (1901). In Knox' words, "if we would have white supremacy, we must establish it by law—not by force or fraud." I *Official Proceedings* at 9. Borrowing from the successful methods of the Second Mississippi Plan and those of other states,[8] the suffrage committee set about to achieve this objective by setting on devices that would subvert the guarantees of the fourteenth amendments without directly provoking a legal challenge. In hopes of success, the committee made resort to facially neutral "tests that took advantage of differing social conditions. Property tests, literacy tests, and disqualification for conviction of certain crimes all fell into this category." S. Hackney, *supra,* at 192; *see also* Deposition of J. Morgan Kousser (Pl.Exh. 9).[9]

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[8] I *Official Proceedings* at 10-13; J. Kousser, *supra,* at 39-40, 189; M. McMillan, *supra,* at 272-75 (Pl.Exh. 12).

[9] In 1898 the Supreme Court held that the Second Mississippi Plan passed muster under the fourteenth amendment. *Williams v. Mississippi,* 170 U.S. 213, 18 S.Ct. 583, 42 L.Ed. 1012 (1898). The Mississippi pro-

The result was an exceptionally byzantine suffrage scheme. S. Hackney, *supra,* at 193; M. McMillan, *supra,* at 359.[10]

While there is scant record of the debates over section 182, the sources of the crimes selected for inclusion in and exclusion from section 182 shed light on the motives of its drafters. In enumerating the crimes that would trigger disfranchisement, the suffrage committee chose offenses that were "peculiar to the Negro's low economic and social status," such as petty property offenses, wife-beating and sex-related crimes. P. Lewinson, *Race, Class & Party* 81 & n. 7 (1963) (cited in (Pl.Exh. 12). The crimes selected by the suffrage committee had their origin in an ordinance drafted and submitted by John Fielding Burns, a Black Belt planter. *See* I *Official Proseedings* at 511. According to Dr. McMillan:

> [t]he crimes [Burns] listed were those he had taken cognizance of for years in his justice of the peace court in the Burnsville district, where nearly all his cases involved Negroes. For example, among those [Burns would have] disfranchised were persons guilty of larceny, bigamy,

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visions included a poll tax and a literacy test coupled with an understanding clause as a loophole for poor whites. *Id.* at 217 n. 1, 18 S.Ct. at 585 n. 1.

As the district court noted, the Alabama proposal that the delegates feared was most vulnerable to constitutional attack was the temporary fighting grandfather clause, section 180. Under that clause veterans and their descendants automatically qualified to register until January 1, 1903, when a permanent provision imposing literacy and property restrictions, section 181, took effect. The Supreme Court later confirmed the delegates' fears when it invalidated a similar Oklahoma grandfather clause. *Guinn v. United States,* 238 U.S. 347, 35 S.Ct. 926, 59 L.Ed. 1340 (1915). Adoption of facially neutral and severable measures such as section 182 was a critical line of defense in case other parts of the suffrage plan did not withstand attack. Deposition of J. Morgan Kousser.

[10]Under the permanent plan which took effect on January 1, 1903, Ala. Const. art. VIII, § 181, citizens had to satisfy requirements of sex, age, residence, literacy and gainful employment or property ownership before they could register. *Id.* §§ 177-178, 181. Registered voters further had to pay a cumulative poll tax of $1.50 per year before they could cast a ballot. *Id.* §§ 178,194. A three-judge court struck down the Alabama poll tax as violative of the fifteenth amendment in *United State. v. Alabama,* 252 F.Supp. 95 (M.D.Ala. 1966) (Rives, J.).

> seduction, incest, rape, or attempt to rape, burglary, or attempt to burglarize, vagrancy, wife beating, forgery and "those who are bastards or loafers or who may be infected with any loathsome or contagious disease."

M. McMillan, *supra,* at 275 n. 76. In newspaper accounts, "Burns estimated the crime of wife-beating alone would disqualify sixty percent of the Negroes." J. Gross, *Alabama Politics and the Negro, 1874-1901* 244 (1969) (cited in Pl.Exh. 9).

According to experts for both sides, the evident racial animus of section 182 was used to induce delegates representing poor whites to vote for other provisions in the suffrage article, such as the poll tax, that were contrary to their interests. Whatever the folly of their vote, their perceptions of the disparate impact of section 182 turned out to be correct. The registrars' expert estimated that by January 1903 section 182 had disfranchised approximately ten times as many blacks as whites. This disparate effect persists today. In Jefferson and Montgomery Counties blacks are by even the most modest estimates at least 1.7 times as likely as whites to suffer disfranchisement under section 182 for the commission of nonprison offenses.[11]

[7] In reviewing this record we are left with a firm and definite impression of error by the court below with respect to the issue of intent. Plaintiffs have more than shouldered their burden of showing that discriminatory intent was a motivating factor in the adoption of section 182; they have presented evidence from which the district court was required to find as a matter of law that discriminatory intent motivated section 182.[12] We therefore turn to the state's burden to demon-

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[11]Because the registrars have not raised the issue whether blacks commit nonprison offenses generally in similarly disproportionate numbers, we do not reach that question.

[12]In fact, the registrars concede the point in brief. They argue, however, that the first prong of *Arlington Heights* is not satisfied because the delegates also intended to deny suffrage to lower-class whites. This is an erroneous reading of the law. Under *Arlington Heights* plaintiff need only show that racially discriminatory intent was *a* motivating factor

strate that the section would still have been adopted had a permissible state reason been the sole consideration.

The registrars rely on a purported state interest in denying the franchise to those convicted of violating its laws. Assuming without deciding that this asserted state interest would pass constitutional muster, we are unable to discern any evidence that the rule was actually intended to serve that interest. *Scheinberg v. Smith*, 659 F.2d 476, 483 n. 2 (5th Cir. Unit B 1981).

In the first place, we note several glaring omissions from the nonprison offenses resulting in disfranchisement under section 182.[13] While underinclusiveness in and of itself does not establish a discriminatory intent, once such intent is shown, underinclusiveness is relevant to whether a second, permissible purpose also motivated the drafters. Had the convention truly wished to vindicate a "good government" purpose, it would have included all crimes not punishable by imprisonment in the penitentiary. *Compare Trimble v. Gordon*, 430 U.S. 762, 768 n. 13, 97 S.Ct. 1459, 1464 n. 13, 52 L.Ed.2d 31 (1977); *O'Brien v. Skinner*, 414 U.S. 524, 530, 94 S.Ct. 740, 743, 38 L.Ed.2d 702 (1974). Nothing in the convention proceedings or the constitution itself suggests a good government purpose. *See Trimble*, 430 U.S. at 768 & n. 13, 97 S.Ct. at 1464 n. 13; *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 641 n. 9, 94 S.Ct. 791, 797 n. 9, 39 L.Ed.2d 52 (1974); L. Tribe,

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behind the challenged legislation. Without question that was done here. The registrars do not advance the denial of the franchise to poor whites as a permissible purpose under the second prong of *Arlington Heights*.

[13]In 1975, the year in which Underwood committed the offense for which he was convicted, nonprison offenses that were neither enumerated in section 182 nor involved moral turpitude and that thus were free from disability included: second-degree manslaughter (carrying a maximum sentence of 12 months and a maximum fine of $500); assault on a police officer (12 months; $1,000); assault and battery (6 months; $500); mailing pornography (12 months; $2000); and aiding the escape of a misdemeanant (12 months; $1000). By contrast, Underwood, who was convicted for issuing a worthless $77.41 check, risked a maximum penalty of a $100 fine for a first offense. For repeated offenses, the most serious punishment authorized was a sentence of three months and a fine of $400.

American Constitutional Law § 12-8, at 602 & n. 1; *id.* § 16-30, at 1085-88 (1978). Indeed, while it is true that the avowed objective of the suffrage committee was to deny the vote to the corrupt and the ignorant, *see* I *Official Proceedings* at 1257, defendants' expert freely admitted under cross-examination that the phrase the "corrupt and the ignorant" referred specifically to blacks and lower-class whites. The same good government rationale, presented in defense of the Alabama poll tax, a sister provision to section 182, struck the late Judge Rives as nothing more than "ingenious after-thought." *United States v. Alabama,* 252 F.Supp. at 101. We hasten to agree and conclude that the registrars as a matter of law failed to present any evidence whatsoever of permissible intent. There was no evidence from which the district court could have found that section 182 would have been adopted had a permissible reason been the sole consideration.[14]

We recognize the registrars' good faith in administering the statute without reference to race. Neither their impartiality nor the passage of time, however, can render immune a pur-

[14]As evidence to the contrary, the state points to *Washington v. State,* 75 Ala. 582 (1884). In that case the Alabama Supreme Court announced in a racially neutral context that the state had the right to preserve the integrity of the vote by disfranchising those who had been convicted of crimes involving moral turpitude. *Id.* at 585. Before this court defendants argue that the holding of that case must have been the motivating force behind section 182 since most of the delegates to the 1901 convention were lawyers and presumably were aware of it. We agree with plaintiffs that this is too attenuated a causal link to prove that section 182, which swept in certain enumerated misdemeanors as well as crimes of moral turpitude, would have appeared in the same form absent racial motive. The decision preceded the convention by seventeen years. Significantly, defendants point to no passage in the proceedings or in the committee report accompanying section 182 that invoked *Washington v. State* as authority for the suffrage provision. As we admonished in *Scheinberg,* 659 F.2d at 483 n. 2, it is improper for us to speculate as to any permissible state purposes that might exist when fundamental rights or the rights of a suspect class are at stake. For the same reason, we cannot give credence to the state's argument that the 1901 expansion of the disabling crimes listed in the 1875 Alabama Constitution demonstrates an affirmation of what the state assumes was the good government purpose of the Redemption-era provision.

posefully discriminatory scheme whose invidious effects still reverberate today.

We hold that section 182 of the Alabama Constitution of 1901 violates on account of race the fourteenth amendment with respect to those convicted of crimes not punishable by imprisonment in the penitentiary. Since those provisions of section 182 that disfranchise nonprison offenders lack legal effect, *Dorchy v. Kansas*, 264 U.S. 286, 289-90, 44 S.Ct. 323, 324, 68 L.Ed. 686 (1924); *see INS v. Chadha*, ___ U.S. ___, 103 S.Ct. 2764, 2775, 77 L.Ed.2d 317 (1983) (citing *Champlin Refining Co. v. Corporation Commission*, 286 U.S. 210, 234, 52 S.Ct. 559, 564-65, 76 L.Ed. 1062 (1932)), we do not reach the additional claims that plaintiffs press. The district court shall issue an injunction ordering voter registration upon request by members of plaintiff class who qualify in all other respects for registration on the electoral rolls.

REVERSED and REMANDED with instructions.

APPENDIX B

Opinion Below

Victor UNDERWOOD and Carmen Edwards, for themselves and all others similarly situated, Plaintiffs-Appellants,

v.

Nell HUNTER et al., Individually and on behalf of all other members of Boards of Registrars in the State of Alabama, Defendants-Appellees.

No. 79-1573
Summary Calendar*

United States Court of Appeals,
Fifth Circuit.

Oct. 10, 1979.

Suit was brought to challenge the section of the Alabama Constitution which disfranchises those convicted of certain crimes. The United States District Court for the Northern District of Alabama, Frank H. McFadden, Chief Judge, dismissed the complaint with prejudice, and plaintiffs appealed. The Court of Appeals held that: (1) when the court sua sponte converts a motion to dismiss into a summary judgment motion by considering matters outside the pleadings, there must be strict adherence to the notice and hearing requirements; (2) it was an abuse of discretion for the district court to grant summary judgment without proper notice and without giving plaintiffs an opportunity to present material and arguments going to the issue of summary judgment; and (3) the allegation that the list of disfranchising offenses found in the challenged constitutional provision was specifically adopted with the intent to disfranchise blacks and in fact abridged the

*Rule 18, 5 Cir.; see *Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York et al.*, 5 Cir., 1970, 431 F.2d 409, Part I.

right to vote on the basis of race stated a claim upon which relief could be granted.

Vacated in part and reversed and remanded in part.

1. Federal Civil Procedure

There must be strict adherence to the notice and hearing requirements when the court sua sponte converts a motion to dismiss for failure to state a claim into a summary judgment motion by considering matters outside the pleadings. Fed.Rules Civ.Proc. rules 12(b), (b) (6), 56, 56(c), 28 U.S.C.A.

2. Federal Civil Procedure

Though a motion to dismiss may result in a rejection of the pleadings, it does not go to the merits of the case. Fed.Rules Civ.Proc. rule 12(b), 28 U.S.C.A.

3. Federal Civil Procedure

Where, after hearing on motion for preliminary injunctive relief was set, defendants moved to dismiss the complaint for failure to state a claim and where the district court, after beginning the proceeding as a hearing on a preliminary injunction, expanded the proceeding to consider arguments on the motion to dismiss as a motion for summary judgment and granted summary judgment for defendants without giving plaintiffs the required ten-day notice and an opportunity to present additional material, district court's procedure was an abuse of discretion. Fed.Rules Civ.Proc. rules 12(b), (b) (6), 56, 56(c), 28 U.S.C.A.

4. Federal Civil Procedure

Where complaint to challenge the section of the Alabama Constitution which disfranchises those convicted of certain crimes alleged that the list of disfranchising offenses was specifically adopted with the intent to disfranchise blacks and in fact abridged the right to vote on the basis of race, it was error for the district court to dismiss the cause of action on the ground that the court could not invalidate a facially neutral statute on the basis of improper motive; plaintiff's

challenge was not based solely on the motive behind the legislation but also included an allegation of the section's discriminatory impact in fact. Const. Ala.1901, § 182; U.S.C.A. Const. Amends. 5, 14.

5. Federal Civil Procedure

On motion to dismiss complaint alleging that the list of offenses found in the section of the Alabama Constitution which disfranchises those convicted of certain crimes was adopted with the intent to disfranchise blacks and in fact abridged the right to vote on the basis of race, court's examination was limited to whether the allegation, if supported by facts developed in later proceedings, stated a claim upon which plaintiffs could recover; on a motion to dismiss, it was irrelevant that there had been no showing of discriminatory impact. Const.Ala.1901, § 182; U.S.C.A.Const. Amends. 1, 5, 14.

6. Civil Rights

Complaint alleging that list of disfranchising offenses found in the section of the Alabama Constitution which disfranchises those convicted of certain crimes was specifically adopted with the intent to disfranchise blacks and in fact abridged the right to vote on the basis of race stated a claim upon which relief could be granted. Const.Ala.1901, § 182; U.S.C.A.Const. Amends. 5, 14; Fed.Rules Civ.Proc. rule 12 (b) (6), 28 U.S.C.A.

Edward Still, Birmingham, Ala., Neil Bradley, ACLU Foundation, Atlanta, Ga., for plaintiffs-appellants.

James S. Ward, Asst. Atty. Gen., Birmingham, Ala., for defendants-appellees.

Appeal from the United States District Court for the Northern District of Alabama.

Before COLEMAN, FAY and RUBIN, Circuit Judges.

PER CURIAM:

Appellants challenge Section 182 of the Alabama Constitution, which disfranchises those convicted of certain crimes. In the District Court appellants asserted four causes of action:

(1) the misdemeanors and minor felonies listed in § 182 as disfranchising offenses unconstitutionally impinge upon the franchise because they deny the franchise without a compelling state interest in violation of the First, Fifth, and Fourteenth Amendments of the U. S. Constitution; (2) the disfranchising offenses deny plaintiffs the equal protection of the laws because more serious offenses are not disabling; (3) disfranchisement for conviction of a "crime involving moral turpitude" is based on a definition that is unconstitutionally vague; (4) the list of offenses was specifically adopted with the intent to disfranchise blacks and in fact abridges the right to vote on the basis of race.

Appellants sought a preliminary injunction restoring them to the voting rolls and in support of this motion reasserted the first three cause of action. They did not urge the fourth cause of action as a basis for the preliminary injunction. On June 21, 1978, a hearing on the preliminary injunction was set for July 19. On July 6, appellants moved to dismiss the complaint for failure to state a claim upon which relief can be granted. The Court began the July 19 proceeding as a hearing on the preliminary injunction, but subsequently expanded it to include arguments on the motion to dismiss. Four witnesses testified at the hearing. On August 11, the Court issued a memorandum opinion in lieu of findings of fact and conclusions of law. It denied the preliminary injunction and held that the plaintiffs failed to state a claim under the first three causes of action. The Court reserved its decision as to the fourth cause of action pending further briefing.

However, as the Court itself noted, the Court heard the motion to dismiss along with the application for a preliminary injunction and was presented with evidence outside the pleadings. The Court further stated that "if the motion to dismiss is treated as a motion for summary judgment under Rule 56, it is due to be granted with respect to the first three causes of action."

Rule 12 (b) of the Federal Rules of Civil Procedure provides that "[i]f, on a motion . . . to dismiss for failure of the plead-

ing to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Rule 56 requires a 10-day notice and an opportunity to present additional material.

[1] This Circuit has upheld the strict requirements of notice embodied in Rule 56 and by reference in Rule 12(b). The procedural facts in *Georgia Southern & Florida Railway Co. v. Atlantic Coast Line Railroad Co.*, 5 Cir. 1967, 373 F.2d 493, *cert. denied*, 389 U.S. 851, 88 S.Ct. 69, 19 L.Ed.2d 120 (1967), were quite similar to those here. There the plaintiff filed a civil action and moved for a preliminary injunction. Shortly before the hearing on the preliminary injunction, the defendant filed a motion to dismiss for failure to state a claim. At the preliminary injunction hearing the Court heard testimony from five witnesses and heard oral argument. Several weeks later the trial judge dismissed the complaint with prejudice, and made findings of fact and law. We noted that because the trial court considered matters outside the pleadings, the motion for summary judgment, and the hearing and notice requirements of Rule 12(b) and 56(c) must be adhered to. We reaffirmed the rule of *Enochs v. Sisson*, 5 Cir. 1962, 301 F.2d 125, where we held it an abuse of discretion to grant summary judgment without proper notice and hearing as required by Rule 56. Subsequent cases have reaffirmed our adherence to the strict notice and hearing requirements of Rules 12(b) and Rule 56 where the court sua sponte converts a 12(b)(6) motion into a summary judgment motion by considering matters outside the pleadings. See, e. g., *Davis v. Howard*, 5 Cir. 1977, 561 F.2d 565; *Sharlitt v. Gorinstein*, 5 Cir. 1976, 535 F.2d 282; *Scott v. Courtesy Inns, Inc.*, 5 Cir. 1973, 472 F.2d 562; *Gutierrez v. El Paso Community Action Program*, 5 Cir. 1972, 462 F.2d 121.

[2] Here the plaintiffs had no indication that a summary

judgment, a final judgment, might result from the preliminary injunction hearing. The first indication that the material produced for the hearing would be used to support a summary judgment was the Court's order of dismissal. Loss on a preliminary injunction motion may not mean a loss at the trial on the merits. Similarly, a motion to dismiss may result in a rejection of the pleadings, but it does not go to the merits of the case. Consequently, a summary judgment carries far greater impact than the matters explicitly before the court at the hearing.

[3] Appellants thus must have an opportunity to present additional material and arguments going to the issue of summary judgment. It may be that they have already provided everything they have, but as we observed in *Georgia Southern*, "When such a limited adjudication [the preliminary injunction] is the order of the day, we cannot say with assurance that the parties will present everything they have. The very intimation of mortality when summary judgment is at issue assures us that the motion will be rebutted with every factual and legal argument available." 373 F.2d at 498.

[4] In a later order, the District Court dismissed the fourth cause of action on the grounds that the court could not invalidate a facially neutral statute on the basis of improper motives in enacting the statute. The court thus refused to consider the intent behind the statute and dismissed the action. We find that the District Court misconstrued the plaintiffs' cause of action. Their challenge to § 182 was not solely on the basis of the motive behind the legislation; rather, it included an allegation of the section's discriminatory impact in fact. Such an allegation of both improper motive and discriminatory impact is in keeping with language in recent Supreme Court cases to the effect that a challenge to state action require a disproportionate racial impact and a showing of discriminary intent and purpose. See, e. g., *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977); *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976).

[5, 6] Appellees contend that there has been no showing of discriminatory impact, but the court's action came simply on a motion to dismiss. This cause of action was not a part of the preliminary injunction hearing. Thus the examination must be limited to whether the allegation, if supported by facts developed in later proceedings, states a claim upon which the plantiffs could recover. We find that it does. Of course, we express no view of the merits of plaintiffs' allegation.

The District Court's decision granting a summary judgment for defendants on plaintiffs' first three causes of action is vacated. The Court's dismissal of the fourth cause of action is reversed and the case is remanded for further proceedings consistent with this opinion.

VACATED IN PART, REVERSED AND REMANDED IN PART.

APPENDIX C

Opinion Below

DECISIONS WITHOUT PUBLISHED OPINIONS

Title	Docket Number	Date of Decision	Disposition	Appeal from and Citation (if reported)
†LaCross v. Craighead	79-1737	7/17/80	AFFIRMED***	E.D.La.
*†Marshall v. Local Lodge No. 875, Brotherhood Railway Carmen of U. S. and Canada, AFL-CIO	79-3211	7/15/80	AFFIRMED	S.D.Miss.
Mize v. First National Bank of Jackson	77-1199	7/18/80	REVERSED AND REMANDED***	S.D.Miss.
*†Morrison v. New Orleans Public Service, Inc.	79-3745	7/16/80	AFFIRMED	E.D.La.
*Mosley v. Midfield Board of Education	79-3470	7/15/80	AFFIRMED	N.D.Ala.
*†Muckle v. Brown	79-2959	7/15/80	AFFIRMED	N.D.Ga.
*Owens v. U. S.	79-3009	7/ 7/80	AFFIRMED***	N.D.Fla., 474 F.Supp. 806
*†Rayon Y Celanese Peruana v. U. S.	79-2125	7/15/80	AFFIRMED	S.D.Ala.
*Roundrtee v. Eastern Air Lines, Inc.	80-5119	7/10/80	AFFIRMED***	S.D.Fla.
Rushing v. Louisiana & Arkansas Railway Co.	78-3172	7/17/80	REVERSED AND AFFIRMED***	E.D.La.
*†Schroeder v. Sherman	79-1991	7/15/80	AFFIRMED	E.D.La.
Underwood v. Hunter	80-7084	7/15/80	AFFIRMED***	N.D.Ala.
*U. S. v. Clayton	80-1112	7/17/80	AFFIRMED***	W.D.Tex.
*U. S. v. Coney	79-4068	7/ 9/80	AFFIRMED***	N.D.Miss.
*U. S. v. Dearing	79-3599	7/10/80	APPEAL DISMISSED***	W.D.Tex.
*†U. S. v. Diaz	79-5637	7/ 1/80	AFFIRMED	W.D.Tex.
*U. S. v. Fitzgerald	79-2208	7/17/80	AFFIRMED***	S.D.Tex.
*†U. S. v. Grote	79-5279	7/14/80	AFFIRMED***	W.D.Tex.
*U. S. v. Higgins	79-5263	7/10/80	AFFIRMED	N.D.Fla.
*U. S. v. Hiroms	80-1074	7/18/80	VACATED AND AFFIRMED***	S.D.Tex.
*U. S. v. Ledesma	79-1682	7/18/80	AFFIRMED***	W.D.Tex.
U. S. v. McGovern	78-5726	7/15/80	AFFIRMED***	M.D.Fla.
*U. S. v. Malcom	79-5580	7/ 1/80	AFFIRMED***	E.D.Tex.
†U. S. v. Maldonado	79-5262	7/17/80	AFFIRMED***	W.D.Tex.
†U. S. v. Namisnak	79-5496	7/10/80	AFFIRMED	S.D.Fla.
*†U. S. v. Price	79-5664	7/ 1/80	AFFIRMED	N.D.Ga.
*†U. S. v. Robinson	79-5441	7/ 1/80	AFFIRMED	E.D.La.
U. S. v. Smythe	79-5356	7/14/80	REVERSED AND REMANDED***	S.D.Tex.
*U. S. v. St. Germain	79-5662	7/18/80	AFFIRMED***	W.D.La.
*†U. S. v. Tamez	79-5202	7/ 1/80	AFFIRMED	N.D.Tex.

DECISIONS WITHOUT PUBLISHED OPINIONS—Continued

Title	Docket Number	Date of Decision	Disposition	Appeal from and Citation (if reported)
*U. S. v. Wallace	80-5114	7/18/80	AFFIRMED***	S.D.Fla.
*Wade v. Oliver	79-3775	7/ 7/80	AFFIRMED***	N.D.Ala.

*Fed.R.App.P. 34(a); 5th Cir.R. 18.
***Opinion contains citation(s) or special notations.
†Local Rule 21 case; see NLRB v. Amalgamated Clothing Works of America, 5 Cir., 1970, 430 F.2d 966.

APPENDIX D

Opinion Below

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

VICTOR UNDERWOOD and CARMEN EDWARDS, for themselves and others similarly sit.	)	
Plaintiffs	)	
- v -	)	C.A. 78-M-0704
NELL HUNTER, JOSEPH J. TRUCKS, ind. and as members of the Board of Registrars of Jefferson County, and THOMAS A. JERNIGAN, CLARICE B. ALLEN, CLEO F. CHAMBERS, ind. and as members of the Board of Registrars of Montgomery County, on behalf of all other members of Boards of Registrars in the State of Alabama	)	
Defendants	)	

ORDER

This action is before the court on motion of defendants for summary judgment regarding counts one, two and three of the complaint and on motion of plaintiffs for certification of classes.

Counts one, two and three were dismissed by order of this court dated August 11, 1978. Subsequently, the Fifth Cir-

cuit vacated this order because the notice and hearing rements were not met when the motion to dismiss was converted into a motion for summary judgment without giving the plaintiffs the requisite ten-day notice.

Having once again reviewed these counts, the court's opinion regarding them remains unchanged from that stated in its memorandum opinion of August 11, 1978. Therefore, counts one, two and three are dismissed with the above noted memorandum opinion, as it pertains to these counts, being incorporated herein.

The remaining count in this action, count four, in substance asserts that Article VIII, § 182, of the Alabama Constitution (1901) abridges the right to vote on the basis of race in violation of the first, fifth, thirteenth, fourteenth and fifteenth amendments and 42 U.S.C. §§ 1981 and 1983. Although the court dismissed this count by order dated February 5, 1979, the ruling was vacated for further proceedings by the Fifth Circuit.

Accordingly, plaintiffs' motion for certification of classes is considered in regard to this count only. Having considered the materials submitted regarding this motion, it is the court's opinion it is due to be granted. The court is satisfied that the requirements of Fed. R. Civ. P. 23(a) and (b)(2) have been met with regard both to plaintiff and defendant classes. Therefore, the action may be maintained by plaintiffs as a class action on behalf of all similarly situated persons who have been purged from the voting rolls or barred from registering to vote within the State of Alabama solely because of their commission of a crime not punishable by imprisonment in a state penitentiary. *See, Ferguson v. Williams,* 330 F.Supp. 1012 (N.D. Miss. 1971); vacated on other grounds, 405 U.S. 1036 (1972), 92 S.Ct. 1322.

Further, the suit may be maintained against the defendants as a class representing all members of the sixty-seven county boards of registrars in the State of Alabama.

Done this 17th day of April, 1980.

/s/ FRANK H. McFADDEN

Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

VICTOR UNDERWOOD and CARMEN EDWARDS, for themselves and all others similarly situated	)	
Plaintiffs	)	
- v -	)	C.A. 78-M-704
NELL HUNTER, JOSEPH J. TRUCKS, individually and as members of the Board of Registrars of Jefferson County, and THOMAS A. JERNIGAN, CLARICE B. ALLEN, CLEO F. CHAMBERS, individually and as members of the Board of Registrars of Montgomery County, on behalf of all other members of Boards of Registrars in the State of Alabama	)	
Defendants	)	

ORDER

This cause came on to be heard on plaintiffs' motion for preliminary injunction and on defendants' motion to dismiss and motion for stay of discovery. Subsequent to the hearing on the preliminary injunction, and in accord with discussions during the hearing, plaintiffs filed a motion for admission of additional exhibits. In conformity with the memorandum opinion issued contemporaneously herewith, the court is of the opinion that the motion for preliminary injunction

should be overruled, the motion for stay of discovery should be granted. The motion to dismiss should be granted in part and held in abeyance in part, and plaintiffs' motion for admission of additional exhibits should be granted.

Accordingly, it is hereby ORDERED, ADJUDGED and DECREED that plaintiffs' motion for preliminary injunction is overruled.

It is further ORDERED that defendants' motion to dismiss is granted in part and causes of action numbered I, II and III are dismissed.

It is further ORDERED that defendants' motion for stay of discovery is granted.

It is further ORDERED that plaintiffs' motion for admission of additional exhibits is granted.

The ruling on the motion to dismiss as to the fourth cause of action is held in abeyance pending further briefs. Any such briefs should be submitted within twenty (20) days of the date of this order.

Done this 11th day of August, 1978.

/s/ FRANK H. MCFADDEN

Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

VICTOR UNDERWOOD and CARMEN EDWARDS, for themselves and all others similarly situated	)	
Plaintiffs	)	
- v -	)	C.A. 78-M-704
NELL HUNTER, JOSEPH J. TRUCKS, individually and as members of the Board of Registrars of Jefferson County, and THOMAS A. JERNIGAN, CLARICE B. ALLEN, CLEO F. CHAMBERS, individually and as members of the Board of Registrars of Montgomery County, on behalf of all other members of Boards of Registrars in the State of Alabama	)	
Defendants	)	

MEMORANDUM OPINION

The two named plaintiffs, one black and one white, seek a declaratory judgment that Article VIII, § 182 of the Alabama Constitution (1901) violates the first, fifth, thirteenth, fourteenth and fifteenth amendments of the Constitution of the United States to the extent that it disqualifies persons convicted of certain offenses from voting. Claims are also made under 42 U.S.C. §§ 1971, 1973, 1981 and 1983. Juris-

diction is posited under 28 U.S.C. §§ 1331(a), 1343(3) and (4), and 2201.

Plaintiffs' complaint is in four counts, which in substance assert:

(1) The disenfranchising misdemeanor and minor felony convictions listed in section 182 unconstitutionally impinge upon the franchise because they deny the franchise without a compelling state interest and the section consequently violates the first, fifth, and fourteenth amendments to the United States Constitution.

(2) The same disenfranchising offenses are a denial of equal protection under the fourteenth amendment.

(3) The term "crime involving moral turpitude" is vague and indefinite and disenfranchisement for conviction of such crimes violates the first, fifth and fourteenth amendments.

(4) Section 182 abridges the right to vote on the basis of race in violation of the first, fifth, thirteenth, fourteenth and fifteenth amendments and 42 U.S.C. §§ 1981 and 1983.

This cause came on to be heard on July 19, 1978 on plaintiffs' motion for preliminary injunction, defendants' motion for stay of discovery and defendants' motion to dismiss. Since the time of the hearing, plaintiffs have filed a motion for admission of additional exhibits. Defendants deny the standing of plaintiffs to bring the suit, assert that the challenged section is constitutional, that plaintiffs have failed to state a claim on which relief can be granted and that plaintiffs have failed to exhaust state remedies. This memorandum opinion is in lieu of findings of fact and conclusions of law, pursuant to Rule 52(a) of the Federal Rules of Civil Procedure.

Article VIII, § 182 of the Alabama Constitution (hereinafter section 182), provides:

> The following persons shall be disqualified both from registering, and from voting, namely:

> All idiots and insane persons; those who shall by reason of conviction of crime be disqualified from voting at the time of the ratification of this Constitution; those who shall be convicted of treason, murder, arson, embezzlement, malfeasance in office, larceny, receiving stolen property, obtaining property or money under false pretenses, perjury, subornation of perjury, robbery, assault with intent to rob, burglary, forgery, bribery, assault and battery on the wife, bigamy, living in adultery, sodomy, incest, rape, miscegenation, crime against nature, or any crime punishable by imprisonment in the penitentiary, or of any infamous crime or crime involving moral turpitude . . . .

Substantially the same provision is found in section 17-3-3 of the Alabama Code (1975).

Plaintiffs do not challenge that portion which provides for disenfranchisement for conviction of any crime punishable by imprisonment in the penitentiary, *i.e.* more than one year. The attack is on the other enumerated crimes and crimes involving moral turpitude. All of the nonfelony crimes enumerated which are now viable are crimes involving moral turpitude. [The non-viable exceptions are: (1) assault and battery on the wife, found unconstitutional in *Hobson v. Pow*, 434 F. Supp. 362 (N.D. Ala. 1977); (2) living in adultery—a felony only after three convictions; (3) miscegenation—no longer punishable.] It is plaintiffs' contention that since some crimes which are not felonies and which do not involve moral turpitude are not disenfranchising, then no crime which is not a felony can be.

The motion for preliminary injunction seeks immediate determination of both plaintiff and defendant classes and injunctive relief, requiring the defendants to send certificates of registration to persons purged from the voting list because of section 182, and to publicize that they will register those who have heretofore been prohibited from voting by section 182. The sought-for plaintiff-class consists of "all persons disqualified from being registered or voting by operation of [section 182]." The purported defendant-class is

to include members of the Boards of Registrars of Alabama. The motion for preliminary injunction is premised on the first three causes of action, but not the fourth.

The facts are simple. Plaintiff Carmen Edwards was convicted of issuing a worthless check in March of 1978. On April 28, 1978, she tried to register to vote in Montgomery County and was told that she must be pardoned before she could register to vote. Plaintiff applied for a pardon and was informed by a letter from the Mayor's office that she could apply for a pardon next year, the year after her conviction. Plaintiff is now 21 years old and had never tried to register to vote prior to April 28, 1978. Plaintiff Victor G. Underwood was registered to vote soon after reaching the age of 21; he is now 27. He was convicted on a charge of issuing a worthless check "approximately 2 to 2½ years ago." By letter dated April 25, 1977, plaintiff was purged from the Jefferson County voter list. Plaintiff called the Jefferson County Board of Registrars to ask why he had been disenfranchised and was given information on how to get a pardon. Plaintiff has taken no steps other than filing this lawsuit on June 21, 1978 toward seeking a pardon or reinstating his right to vote. Both plaintiffs are qualified to vote in other particulars except for their convictions on the charge of issuing a worthless check. Defendants initially challenge the standing of the plaintiffs to bring this action. The court is of the opinion that this requires little comment. Plaintiffs were disenfranchised under the provisions of the section in question and in the court's view may challenge its constitutionality. Defendants then contend that the section is clearly constitutional and the complaint is due to be dismissed for failure to state a claim on which relief can be granted.

There is no doubt that a state may deny the franchise to felons. In *Richardson v. Ramirez*, 418 U.S. 24, 94 S. Ct. 2655 (1974), the court held that California could constitutionally exclude ex-felons from the vote. The court found "affirmative sanction" in the second section of the fourteenth amend-

ment. That section forbids the denial of the right to vote "except for participation in rebellion, *or other crime*." U.S. Const. amend. XIV, § 2 (emphasis supplied). *Ramirez*, as strictly limited, would not apply to any situation but that one within the narrow holding. Although some of the discussion of the legislative history of the second section of the fourteenth amendment speaks specifically of felonies known at common law, the actual language of the section speaks only of "any crime," and the court is of the opinion that *Ramirez* may be properly applied to cases involving crimes other than felonies. *Ramirez* cited with approval two cases approving exclusion of bigamists and polygamists from the franchise. 418 U.S. at 53, 94 S. Ct. at 2670, citing *Davis v. Beason*, 133 U.S. 333, 10 S. Ct. 299 (1890); *Murphy v. Ramsey*, 114 U.S. 15, 5 S. Ct. 747 (1885). *Ramirez* also quoted the following language from a case allowing a literacy requirement for voting: "Residence requirements, age, previous criminal record are obvious examples indicating factors which a State may take into consideration in determining the qualifications of voters." 418 U.S. at 53, 94 S. Ct. at 2670, quoting *Lassiter v. North Hampton County Board of Elections*, 360 U.S. 45, 51, 79 S. Ct. 985, 990 (1959) (citations omitted).

Defendants primarily rely on two cases. The one most nearly in point is *Kronlund v. Honstein*, 327 F. Supp. 71 (N.D. Ga. 1971). Plaintiff there challenged the constitutionality of a provision disenfranchising those convicted of treason against the state, of embezzlement of public funds, of malfeasance in office, of bribery or larceny, or of any crime involving moral turpitude, punishable by imprisonment in the penitentiary. The Georgia provision is dissimilar to the Alabama one. Although plaintiff's crime was a felony and a crime involving moral turpitude, she was disenfranchised not simply because she committed a felony, but because it involved moral turpitude. In other words, not all felonies were disenfranchising crimes. Plaintiffs contend that the only

issue in *Kronlund* was whether "a state may constitionally disenfranchise otherwise qualified voters because they have been convicted of a felony" (327 F. Supp. at 73) and therefore has no application. The court does not agree with plaintiffs' thesis. The following language shows that the court was concerned not specifically with a felony, but with the type of crime involved:

> A State has an interest in preserving the integrity of her electoral process by removing from the process those persons with proven anti-social behavior whose behavior can be said to be destructive of society's aims. For this reason, a State may prohibit idiots and insane persons, as well as, those convicted of certain offenses from participating in her elections. A State may also legitimately be concerned that persons convicted of certain types of crimes may have a greater tendency to commit election offenses. Therefore, Georgia has a compelling state interest sufficient to justify the voting restrictions set forth in § 2-801 of the Georgia Constitution. Since the State does have this legitimate interest to protect, this provision does not unjustifiably abridge the plaintiff's First Amendment rights.

327 F. Supp. at 73.

Defendants also rely on *Waddy v. Davis*, 445 F.2d 1 (5th Cir. 1971). In *Waddy*, plaintiffs were removed from the voting list pursuant to guilty pleas. Plaintiffs alleged that they were not represented by counsel nor advised that they would be removed from the voting list at the time they made their pleas. In *Waddy*, plaintiffs did not question the fact that the crime (receiving unemployment benefits by reason of misrepresentation) would disqualify them from voting. Plaintiffs did not directly attack the plea but theorized that their lack of information should erase the results of the guilty plea. The court held that the plaintiffs were in reality attacking their convictions and that the condition must be the focal point of the suit. Because the disenfranchising provision was not challenged, the court is of the opinion that *Waddy v. Davis* is not relevant.

This court is further guided here by a very recent case, *Shepherd v. Trevino*, 575 F.2d 110 (5th Cir. 1978). The issue there concerned reenfranchisement provisions under a statute disenfranchising convicted felons. Plaintiffs alleged an equal protection violation under 42 U.S.C. § 1983. The alleged violation occurred because of a disparity in the means of reenfranchisement between state and federal felons; the court affirmed the dismissal of the action for the failure to state a claim. The court refused to require strict scrutiny but did require a rational relationship to the achieving of a legitimate state interest.

Although both *Ramirez* and *Shepherd* dealt specifically with felonies, the court is of the opinion that this does not preclude the application of those cases to this one. Accordingly, the disenfranchisement scheme here, based on nonfelony convictions, like a similar scheme based on felony convictions, is valid so long as the rational relationship test is met. The court therefore rejects the equal protection argument of the plaintiffs and finds that the defendants have a sufficient state interest in withholding the vote from those criminals who commit crimes involving moral turpitude. state has an interest in excluding those who would have a greater tendency to violate Alabama's criminal laws, particularly where crimes which involve moral turpitude are concerned. The court is of the opinion that this section of the Alabama Constitution does not violate the federal Constitution and that the rational relationship test has been met.

Where federal question jurisdiction is involved, the test for dismissal is rigorous. Dismissal is not warranted if a complaint alleges the existence of a federal question, unless the claim is frivolous or foreclosed by prior decisions of the Supreme Court. *Bell v. Hood*, 327 U.S. 678, 66 S. Ct. 773 (1946). See also *Hilgeman v. National Ins. Co. of America*, 547 F.2d 298 (5th Cir. 1977). The court is of the opinion that with respect to the first three causes of action, the test for dismissal has been met; and plaintiffs have failed to state

a claim on the first three causes of action. However, the court heard the motion to dismiss along with the application for a preliminary injunction and was presented evidence outside the pleadings. The court is further of the opinion that if the motion to dismiss is treated as a motion for summary judgment under Rule 56, it is due to be granted with respect to the first three causes of action.

The fourth cause of action alleges that the section was enacted with a racial animus and that it abridges the right to vote on the basis of race. Facially it is color-blind, but the court is of the opinion that the matter should not be dealt with on a Rule 12(b) motion to dismiss, at least until the parties have had time to brief the question. Accordingly, the ruling on that motion will be held in abeyance pending further briefing.

The preliminary injunction was premised on the first three causes of action and since they will be dismissed, the issue is not reached, nor is it necessary at this time to discuss any class action aspects of the case as it now stands. However, even if the first three causes of action did state claims, there has been no showing here which would entitle plaintiffs to a preliminary injunction.

In order to be entitled to a preliminary injunction, plaintiffs must establish four prerequisites: that there is a substantial likelihood that the movant will ultimately prevail on the merits, that the movant will suffer irreparable injury unless the injunction is issued, that the threatened injury to the movant outweighs the damage the injunction might cause the opponent; and that the injunction would not be adverse to the public interest. *E.g., Compact Van Equipment Co., Inc. v. Leggett & Platt, Inc.*, 566 F.2d 952 (5th Cir. 1978). Obviously, the court is of the view that the first prerequisite is not present. Moreover, the court is of the opinion that there has been no showing of irreparable harm. Concededly, the plaintiffs will be denied the right to vote in the forthcoming election under the law. This is not of suffi-

cient magnitude to cause the court to enjoin the application of the existing law. Whatever the harm to plaintiffs, the court is satisfied that the harm to the public if the injunction issued would be greater than any harm to the plaintiffs if it does not.

Defendants' contention that plaintiffs did not exhaust their state remedies must be considered in light of the motion to dismiss as it applies to the fourth cause of action. Although that fact is true, the court is of the opinion that exhaustion is not required here. As *Kronlund v. Honstein*, 327 F. Supp. 71 (N.D. Ga. 1971), cited by defendants, states, there is no exhaustion requirement in a case such as this. The statement made in *Waddy v. Davis*, 445 F.2d 1 (5th Cir. 1971), requiring exhaustion is not pertinent. There, unlike here, the attack was on the conviction and its results. Here, the attack is on the statute. There is simply no basis for requiring an exhaustion of state remedies here.

In accordance with the foregoing commentary, the court is of the opinion that the motion for preliminary injunction should be overruled, and that the motion to dismiss should be granted in part and the ruling on the remainder of the motion held in abeyance. Plaintiffs' motion for admission of additional exhibits should be granted, although that evidence makes no difference in the court's decision. Defendants' motion for stay of discovery is due to be granted until the court has finally ruled on the motion to dismiss the fourth cause of action.

/s/ FRANK H. MCFADDEN
Chief Judge

August 11, 1978.

APPENDIX E

Opinion Below

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

VICTOR UNDERWOOD and CARMEN EDWARDS, for themselves and all others similarly situated	)	
Plaintiffs	)	
- v -	)	CV 78-M-704
NELL HUNTER, et al.	)	
Defendants	)	

ORDER

In accordance with the memorandum opinion entered contemporaneously, it is ORDERED, ADJUDGED and DECREED that judgment be, and hereby is, granted in favor of defendants and that the complaint be, and hereby is, dismissed.

Costs are taxed to plaintiffs.

Done this 23rd day of December, 1981.

/s/ FRANK H. MCFADDEN
Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

VICTOR UNDERWOOD and CARMEN EDWARDS, for themselves and all others similarly situated	)	
Plaintiffs	)	
- v -	)	CV 78-M-704
NELL HUNTER, et al.	)	
Defendants	)	

MEMORANDUM OPINION

Plaintiffs seek to strike down part of section 182 of the Alabama constitution of 1901 which denies the franchise for conviction of crimes involving moral turpitude. A hearing on the merits has been held. This opinion is entered in lieu of findings of fact and conclusions of law under Rule 52(a), Fed. R. Civ. P.

The plaintiffs, Victor Underwood and Carmen Edwards, have been convicted of writing bad checks, and have been disenfranchised by the operation of § 182. Carmen Edwards, a black, alleges that the provision, though neutral on its face, is a classification by race which is unconstitutional under the fourteenth amendment. Both Edwards and Underwood, a white, allege that the provision violates a part of the Reconstruction Acts which they argue places a limit upon Alabama's ability to regulate its elections.

The plaintiffs' argument based upon the Reconstruction Acts is that the statute which purported to readmit Alabama did so on condition that the State's constitution not be

amended to disenfranchise the State's citizens other than for felonies. Ch. 70, 15 Stat. 73 (1866). The statute also approved the provisions of the State's then existing constitution. Defendants contend that this Act of Congress is unconstitutional under the tenth and fourteenth amendments. It is not necessary to reach this issue since the Alabama Constitution does not contravene the Act.

Alabama's Constitution of 1819 and 1867 disenfranchised those "convicted of bribery, perjury, forgery, or other high crimes or misdemeanors." Alabama Const. of 1819, Article VI § 5; Alabama Const. of 1867, Article VIII § 1. The term misdemeanors in the phrase "high crimes or misdemeanors" is not used in its present ordinary sense. According to Blackstone, in this context the word means crimes violating the public trust. Blackstone's Commentaries, Book IV, Ch. IX. English lawyers of Blackstone's time saw the list of crimes as limited to those violating the King's prerogative. While arguably the list of "high crimes and misdemeanors" did not include crimes of moral turpitude to English lawyers, the inclusion of forgery in Alabama's list of disenfranchising crimes indicates a broader meaning. Forgery involves moral turpitude, and was not a crime against the King's prerogatives or in violation of a public trust. Misdemeanors would therefore include crimes of moral turpitude such as the plaintiffs committed. This provision having been approved by the act of Congress, the 1901 constitution, if it goes beyond the readmission statute's limits, does not do so as to these plaintiffs. Their claim under the readmission statute fails.

Only one plaintiff asserts a claim based upon the fourteenth amendment. Carmen Edwards grounds her argument of unconstitutionality upon the legislative history of the 1901 constitution. To understand this, one must understand something of the background of the convention that wrote the constitution. After the major upheavals of reconstruction had subsided, and to a great extent in response to the perceived threat of a so-called force bill which would have

brought federal intervention in state elections, the states of the confederacy began to hold constitutional conventions, beginning with Mississippi in 1890. A major purpose of these conventions was to disenfranchise blacks. Woodward, *The Origins of the New South*, at 321 (1951). However, these conventions also occurred in the wake of a general populist revolt, and so another concern of these conventions was that whites, on sectional and class grounds, would vote. *Ibid.* at 331. It is fairly clear, as the testimony of the defendant's expert witness, Dr. J. N. Thornton of the University of Michigan, bears out, that Alabama's constitution conformed to this pattern. The leading historian of Alabama's constitution has stated:

> The revision of suffrage was the cardinal reason for the assembling of the convention. . . . The convention had met to establish "white supremacy by law" and to overthrow the revolutionary methods of "force and fraud used in Alabama since Reconstruction [to curtail black voting power] lest representative government perish in Alabama."

MacMillan, Constitutional Development in Alabama, 1798-1901, 267-68 (repl. ed. 1978), quoting John Knox, the president of the Constitutional Convention.

At the convention, the debates over disenfranchisement centered upon provisions developed by other states and which have since been struck down as unconstitutional—the poll tax and the grandfather clause. In committee, a provision known as the "fighting grandfather clause" was developed. This clause was patterned after the grandfather clause, which was developed in Louisiana. Alabama's version, in § 780 of the constitution, allowed the franchise to those descended from veterans of the Revolutionary War, the War of 1812, the war with Mexico, the Civil War for the Confederacy, and the Spanish-American War. The bulk of the debate was on this clause. That portion of the debate concerning the section disenfranchising for crimes only treated the inclusion of violations of the vagrancy statute.

The committee report for the suffrage provisions states: "Our main purpose has been to remove the venal and incompetent from the exercise of the elective franchise and not to violate any provisions of the constitution of the United States." 1 Official Proceedings of the Constitution of the State of Alabama at 1257 (1901). The report goes on to say that the provisions are not intended to discriminate on the basis of race, color, or previous condition of servitude. The minority report from the committee argues that the fighting grandfather clause *is* unconstitutional as it *does* discriminate on the basis of race. *Ibid.* at 1264-1265.

The protestations of good intention on the part of the legislature are to be considered with skepticism. However, one point is clearly made. The State has a valid interest in denying the franchise to those convicted of violating its laws. Cf. *Richardson v. Raminez*, 418 U.S. 24 (1974). The legislative history expressly keyed the suffrage provisions to this interest. The expressions of concerns over unconstitutionality by those at the convention who doubted the constitutionality of the suffrage provisions lay elsewhere—on the fighting grandfather clause. There is simply nothing in the legislative history to lead one to decide that the provisions disenfranchising those convicted of crimes are based upon the racism present at the constitutional convention.

This case, where the plaintiffs allege impermissible motive in the face of a permissible one, is controlled by a principle of constitutional law that an impermissible legislative motive standing alone will not invalidate legislation for which there is a permissible basis. *Palmer v. Thompson*, 403 U.S. 217 (1971).

Palmer involved the desegregation of public facilities in Jackson, Mississippi. The city was ordered by a court to desegregate its swimming pools and responded by closing them. There was proof that the closing "was motivated by a desire to avoid integration of the races." *Palmer*, 403 U.S. at 224. The Court noted that no cases had invalidated legis-

lation because of the motives of the men who voted for it. The court held that the fourteenth and fifteenth amendment cases suggesting that motive is relevant involved motive combined with discriminatory impact, such as *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218 (1964). This has continued to be true of the Supreme Court's cases. Cases holding that proof of intent was an essential part of a § 1983 case also had clear records of discriminatory impact. Cf. *Washington v. Davis*, 426 U.S. 229 (1976).

Palmer also stands for the principle that, where legislation is equally justified for a bad motive (racism) or a good one (in *Palmer*, economics), the bad motive will not overturn the statute. This principle has been recognized by the Supreme Court as recently as last term when it refused to hold unconstitutional statutory rape laws. *Micheal M. v. Superior Court of Sonoma County*, ____ U.S. ____, 101 S.Ct. 1200 (1981). Justice Rehnquist wrote the plurality opinion in which the Chief Justice and Justices Powell and Stewart joined. Justice Blackmun joined in the result. The plurality opinion noted that one of the original justifications of such laws was "to protect the virtue and chastity of women." The Court noted that such a basis was unjustifiable because it rests on archaic stereotypes:

> The question for us—and the only question under the federal constitution—is whether the legislation violates the Equal Protection Clause of the Fourteenth Amendment and not whether its supporters may have done so for reasons no longer generally accepted. . . . "[I]t is a familiar principle of constitutional law that this Court will not strike down a statute on the basis of an alleged illicit legislative motive." *United States v. O'Brien*, 391 U.S. 367, 383 (1968).

Micheal M, 101 S.Ct. 1206, n.7.

There is no basis for this court to credit any bad motive on the part of the legislature and yet to ignore the perfectly found motive grounded in the State's interests in governing

exercise of the franchise by those convicted of crimes. Furthermore, intent as to the provision involved here has not been proven. The claim under the fourteenth amendment also fails.

/s/ FRANK H. MCFADDEN
Chief Judge

December 23, 1981

APPENDIX F

Judgment

Victor UNDERWOOD and Carmen Edwards, for themselves and all others similarly situated, Plaintiffs-Appellants,

v.

Nell HUNTER, et al.,
Defendants-Appellees.

No. 82-7011.

United States Court of Appeals,
Eleventh Circuit.

April 10, 1984.

Plaintiffs who were barred from representation on election rolls filed suit against counties' boards of registrars under sections 1981 and 1983 challenging, as discriminatory, state constitutional section under which they were disfranchised. The United States District Court for the Northern District of Alabama, Frank H. McFadden, J., entered judgment in favor of plaintiffs on two of five causes of action, and plaintiffs appealed. The Court of Appeals, Vance, Circuit Judge, held that state constitutional section disfranching those convicted of, inter alia, crimes of moral turpitude violated the Fourteenth Amendment by denying plaintiffs' right to vote on basis of race.

Reversed and remanded with instructions.

1. Elections

A successful Fourteenth Amendment claim of race discrimination in matters affecting voting requires that plaintiffs establish an intent to abridge the franchise on account of race. U.S.C.A. Const. Amend. 14.

2. Constitutional Law

In a case alleging discrimination on basis of race, permissible motivating interest articulated by the state must be compelling, and means employed must be precisely drawn to accomplish exactly objective that state purports to further.

3. Federal Courts

On review, district court's findings of fact are entitled to be respected unless they are clearly erroneous.

4. Federal Courts

Under clearly-erroneous standard, lower court's findings of fact shall stand unless reviewing court is left with definite and firm impression that mistake has been made.

5. Federal Courts

Clearly-erroneous standard of review applies to findings of both subsidiary and ultimate fact.

6. Federal Courts

Questions of law are subject to independent review, and findings made under an erroneous review of law may be set aside on that basis.

7. Constitutional Law

Plaintiffs, who were barred from representation on election rolls pursuant to state constitutional section disfranchising those convicted of, inter alia, crimes of moral turpitude, met burden of showing that the section was specifically adopted with intent to disfranchise blacks on account of their race, and state failed to meet burden to demonstrate that the section would still have been adopted had a permissible state reason been the sole consideration; therefore, the section violated the Fourteenth Amendment by denying plaintiffs' right to vote on basis of race. U.S.C.A. Const. Amend. 14; Ala.Const. § 182.

Appeal from the United States District Court for the Northern District of Alabama.

Before TJOFLAT, VANCE and CLARK, Circuit Judges.

VANCE, Circuit Judge:

In 1977 and 1978 the boards of registrars for Montgomery and Jefferson Counties in Alabama barred Carmen Edwards and Victor Underwood, respectively, from representation on the election rolls. They were denied voting privileges under section 182 of the Alabama Constitution, adopted in 1901, which disfranchises those convicted of crimes punishable by imprisonment in the penitentiary, crimes of moral turpitude and other enumerated misdemeanors and felonies.[1] Edwards and Underwood were disfranchised for presenting worthless checks, a misdemeanor which the registrars classify as a crime of moral turpitude.[2]

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[1]Section 182 of the Alabama Constitution of 1901 provides:

> The following persons shall be disqualified both from registering, and from voting, namely:
>
> All idiots and insane persons; those who shall by reason of conviction of crime be disqualified from voting at the time of the ratification of this Constitution; those who shall be convicted of treason, murder, arson, embezzlement, malfeasance in office, larceny, receiving stolen property, obtaining property or money under false pretenses, perjury, subornation of perjury, robbery, assault with intent to rob, burglary, forgery, bribery, assault and battery on the wife, bigamy, living in adultery, sodomy, incest, rape, miscegenation, crime against nature, or any crime punishable by imprisonment in the penitentiary, or of any infamous crime or crime involving moral turpitude; also, any person who shall be convicted as a vagrant or tramp, or of selling or offering to sell his vote or the vote of another, or of buying or offering to buy the vote of another, or of making or offering to make a false return in any election by the people or in any primary election to procure the nomination or election of any person to any office, or of suborning any witness or registrar to secure the registration of any person as an elector.

[2]In determining whether an offense is a crime of moral turpitude, the registrars follow Alabama case law and, in the absence of judicial decision, opinions of the state attorney general. The registrars' actions in this case were based on opinions of the attorney general. In *Pippin v. State*, 197 Ala. 613, 74 So. 340 (1916), the Alabama Supreme Court defined a crime of moral turpitude as an act that is

Edwards and Underwood filed suit against the boards of registrars of Montgomery and Jefferson Counties under 42 U.S.C. §§ 1981 and 1983 challenging section 182 as it applies to those convicted of crimes not punishable by imprisonment in the penitentiary (nonprison offenses). They alleged five causes of action, one of which is dispositive. Plaintiffs alleged that the nonprison offenses warranting disfranchisement under section 182 were specifically adopted with the intent to disfranchise blacks on account of their race and that the provision has had exactly its intended effect.[3] They requested a declaration invalidating section 182 and sought

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" 'immoral itself, regardless of the fact whether it is punishable by law. The doing of the act itself, and not its prohibition by statute, fixes the moral turpitude.' " *Id.* at 616, 73 So. at 342 (quoting *Fort v. City of Brinkley*, 87 Ark. 400, 112 S.W. 1084 (1908)). The attorney general in opinion has acknowledged that the classification of presently unaddressed offenses "will turn upon the moral standards of the judges who decide the question." Pl.Exh. 3; *see also infra* note 13. "Thus does the serpent of uncertainty crawl into the Eden of trial administration." McCormick, *McCormick on Evidence* § 43, at 85-86 (2d ed. 1972).

[3]Plaintiffs also alleged: (1) that the section denies the franchise to plaintiffs without a compelling state interest in contravention of the first, fifth and fourteenth amendments; (2) that the section denies plaintiffs equal protection of the laws because more serious crimes are not disabling; (3) that the term "crime involving moral turpitude" is unconstitutionally vague; and (4) that the suffrage provisions of the 1901 Alabama Constitution are stricter than those of the 1868 Constitution, in violation of the Act of Readmission, Act of June 25, 1868, ch. 70, 15 Stat. 73.

Before plaintiffs amended their complaint to add the Readmission Act claim, the district court granted summary judgment for the registrars on the first three causes and dismissed the race discrimination claim for failure to state a claim upon which relief could be granted. We reversed and remanded for further proceedings. *Underwood v. Hunter*, 604 F.2d 367 (5th Cir. 1979). During subsequent discovery plaintiffs moved for a preliminary injunction premised on the first three theories so that they could vote in the 1980 primaries and general election. We affirmed the order of the district court denying relief because we concluded that plaintiffs had not shown any prospect of irreparable harm. *Underwood v. Hunter*, 622 F.2d 1042 (5th Cir. 1980). After the first three claims were again dismissed by the trial court, the Readmission Act claim proceeded to trial with the race discrimination claim.

to enjoin its future application. With respect to the two claims proceeding to trial, the district court certified a plaintiff class of those disfranchised for nonprison offenses, represented by Underwood and Edwards,[4] and a defendant class of all Alabama county boards of registrars. Following trial in 1981, the district court issued a memorandum opinion ruling for defendants on these two causes of action. Plaintiffs filed this appeal challenging the disposition of all five claims. We hold that section 182 violates the fourteenth amendment because it denies plaintiffs the right to vote on the basis of race.[5]

[1, 2] A successful fourteenth amendment claim of race discrimination in matters affecting voting requires that plaintiffs establish an intent to abridge the franchise on account of race. *City of Mobile v. Bolden*, 446 U.S. 55, 66-67, 100 S.Ct. 1490, 1499-1500, 64 L.Ed.2d 47 (1980) (plurality opinion); *Washington v. Davis*, 426 U.S. 229, 240, 96 S.Ct. 2040, 2047-48, 48 L.Ed.2d 597 (1976). To establish a violation of the fourteenth amendment in the face of mixed motives, plaintiffs must prove by a preponderance of the evi-

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[4]Edwards is black and Underwood is white. From the record of the proceedings below it appears that for purposes of the race discrimination claim the trial court treated Edwards as the representative of a subclass of blacks disfranchised by virtue of conviction of nonprison offenses.

[5]The registrars argue that mootness and failure to exhaust administrative remedies bar us from reaching the merits. Exhaustion of administrative remedies, however, is not a prerequisite to the bringing of this action under 42 U.S.C. § 1983. *Patsy v. Board of Regents*, 457 U.S. 496, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982). The charge of mootness lacks support. In 1980 the office of the state attorney general issued an opinion letter declaring that convictions under municipal ordinances would not warrant disfranchisement. Def.Exh. 2. The registrars argue on the basis of this directive that Edwards might now qualify for registration because worthless check writing is a violation of both city ordinance and state statute. They have adduced no proof that Edwards was convicted of a municipal offense alone and in the meantime they have not offered to reverse their original decision barring registration. We therefore discern nothing that in any way extinguishes Edwards' claim.

dence that racial discrimination was a substantial or motivating factor in the adoption of section 182. They shall then prevail unless the registrars prove by a preponderance of the evidence that the same decision would have resulted had the impermissible purpose not been considered. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 270 & n. 21, 97 S.Ct. 555, 566 & n. 21, 50 L.Ed.2d 450 (1977); *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 287, 97 S.Ct. 568, 576, 50 L.Ed.2d 471 (1977). In a case alleging discrimination on the basis of race, the permissible motivating interest articulated by the state must be compelling, *Crawford v. Board of Education*, 458 U.S. 527, 536, 102 S.Ct. 3211, 3217, 73 L.Ed.2d 948 (1982), and the means employed must be precisely drawn to accomplish exactly the objective that the state purports to further. *Kramer v. Union Free School District*, 395 U.S. 621, 632, 89 S.Ct. 1886, 1892, 23 L.Ed.2d 583 (1969).

The district court found that plaintiffs failed to show evidence of discriminatory purpose in the adoption of section 182. It next concluded that even if a racial animus was demonstrated, the state's purported interest in denying criminals the franchise is a permissible one.

[3-6] We cannot agree with the district court. Our review of the record reveals that the district court erred both in its factual findings and in its legal analysis.[6] We conclude that

[6]On review the district court's findings of fact are entitled to be respected unless they are clearly erroneous. *Hardin v. Stynchcomb*, 691 F.2d 1364, 1372 (11th Cir. 1982). Under the clearly erroneous standard, the lower court's findings of fact shall stand unless the reviewing court is left with the definite and firm impression that a mistake has been made. *American National Bank v. Federal Deposit Insurance Corp.*, 710 F.2d 1528, 1533-34 (11th Cir. 1983). This standard of review applies to findings of both subsidiary and ultimate fact. *Pullman-Standard v. Swint*, 456 U.S. 273, 287, 102 S.Ct. 1781, 1789, 72 L.Ed.2d 66 (1982); *American Civil Liberties Union v. Rabun County Chamber of Commerce, Inc.*, 698 F.2d 1098, 1110 (11th Cir. 1983). Questions of law are subject to independent review, and findings made under an erroneous view of the law may

the district court's findings of lack of discriminatory intent in the adoption of section 182 is clearly erroneous. In addition, the district court failed to require the state to show that section 182 would have been enacted in the same form in the absence of racial animus, as *Arlington Heights* requires. By allowing the state to prevail on what the district court concluded was a showing of permissible intent, the court brought its inquiry to a premature end.[7]

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be set aside on that basis. *Pullman-Standard*, 456 U.S. at 287, 102 S.Ct. at 1789.

[7]The court held that plaintiffs would not have prevailed even if they had shown discrimination because the court discerned a permissible reason for restricting the franchise of criminals. Citing *Palmer v. Thompson*, 403 U.S. 217, 91 S.Ct. 1940, 29 L.Ed.2d 438 (1971), and the plurality opinion in *Michael M. v. Superior Court*, 450 U.S. 464, 101 S.Ct. 1200, 67 L.Ed.2d 437 (1981), the district court ruled that "an impermissible motive standing alone will not invalidate legislation for which there is a permissible basis."

The lower court's reliance on *Michael M.* is misplaced. In *Michael M.*, Justice Rehnquist, writing for a plurality of the Court, quoted *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), to the effect that the existence of an illicit legislative motive does not *automatically* result in a conclusion of unconstitutionality. 450 U.S. at 472 n. 7, 101 S.Ct. at 1205-06 n. 7. The plurality proceeded to cite the burden-shifting test announced in note 21 of *Arlington Heights*, signifying that discriminatory intent *will* defeat a statute where the state is unable to demonstrate that the same result would have occurred solely in light of a permissible motive.

We do not read *Palmer* to the contrary. In *Arlington Heights* the Court cited *Palmer* as supportfor the proposition that a plaintiff need not necessarily prove that racial discrimination was the sole motivating factor in order to prevail:

> *Davis* does not require a plaintiff to prove that the challenged action rested solely on racially discriminatory purposes. Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the "dominant" or "primary" one.[11]
>
> [11]In *McGinnis v. Royster*, 410 U.S. 263, 276-277, 93 S.Ct. 1055, 1063, 35 L.Ed.2d 282 (1973), in a somewhat different context, we observed: "The search for legislative purpose is often elusive enough, *Palmer v. Thompson*, 403 U.S. 217, 91 S.Ct. 1940, 29 L.Ed.2d 438 (1971), without a requirement

Applying the *Arlington Heights* test to the case at hand, the first step is to inquire whether intent to deny the franchise on the basis of race was a substantial or motivating factor in the enactment of section 182. In conducting this inquiry we are mindful of the testimony by expert witnesses for both sides that the purpose of section 182 must be considered in light of the overall purpose of the 1901 constitutional convention and the suffrage article, taken as a whole.

Blacks first received the right to vote in Alabama under the Constitution of 1867, which created universal suffrage for males over the age of twenty-one with certain exceptions not relevant here. Ala. Const. of 1867, art. VII. With the end of Reconstruction, the white citizens of Alabama moved to reassert their once unquestioned political supremacy. The 1890's ushered in an era of disfranchisement not only in Alabama but throughout the South. In 1890 Mississippi adopted a new state constitution embodying the suffrage restrictions proposed in the "Second Mississippi Plan." By 1908 eleven other states, including Alabama, had followed suit through various statutory and constitutional devices. S. Hackney, *Populism to Progressivism in Alabama* 147 (1969); C. Woodward, *Origins of the New South 1877-1913* 321 (1971).

In the judgment of modern scholars, the organizers of the 1901 Alabama convention sought to disfranchise poor dissident whites as well as blacks. M. McMillan, *Constitutional Development in Alabama, 1798-1901: A Study in Politics,*

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that primacy be ascertained. Legislation is frequently multipurposed: the removal of even a 'subordinate' purpose may shift altogether the consensus of legislative judgment supporting the statute."

429 U.S. at 265 & n. 11, 97 S.Ct. at 563 & n. 11. In light of this passage, we conclude that *Arlington Heights* supercedes any dicta which *Palmer* might contain to the effect that a permissible purpose will always defeat an impermissible motive. *See also Washington v. Davis*, 426 U.S. at 242-43, 96 S.Ct. at 2048-49 (*Palmer* "did not involve, much less invalidate, a statute or ordinance having neutral purposes but disproportionate racial consequences"); Note, *Making the Violation Fit the Remedy: The Intent Standard and Equal Protection Law*, 92 Yale L.J. 328, 330 (1982).

the Negro, and Sectionalism 249, 269 (1955) (Def.Exh. 14). With the ascendency of the Populists a decade earlier, the black vote had acquired added leverage. Whites, Democrats and Populists alike, view for black ballots in any way they could, with favors, pardons of convictions, outright vote purchase and massive electoral fraud. *United States v. State of Alabama*, 252 F.Supp. 95, 98 (M.D.Ala.1966) (three-judge court); S. Hackney, *supra*, 36-37, 89, 176-77. As the court below noted, resort to such methods had become increasingly precarious in light of renewed Northern moves to extend the federal election supervisory act of 1870. In 1890 the Senate had narrowly defeated the Lodge force bill, which called for tighter federal control of all phases of voting, from voter registration to ballot tabulation. J. Kousser, *The Shaping of Southern Politics* 29-30 (1974); C. Woodward, *supra*, at 254-55. The most effective way to ward off federal intervention as well as fraud, according to the reformers, was to eliminate the Negro vote. S. Hackney, *supra*, at 146, 175-77; M. McMillan, *supra*, at 269; C. Woodward, *supra*, at 326-27. In the words of one delegate to the 1901 convention, "Now we are not begging for 'ballot reform' or anything of that sort, but we want to be relieved of purchasing the Negroes to carry elections. I want cheaper votes." Speech of Delegate William A. Handley, III *Official Proceedings of the Constitutional Convention of the State of Alabama, May 21st, 1901 to September 3rd, 1901* 2276-77 (1940) [hereinafter cited as *Official Proceedings*].

When the Alabama constitutional convention assembled in May 1901, the question was not whether to disfranchise the Negro but rather how to do so constitutionally. In his opening address John B. Knox, the president of the convention, declared:

> And what is it that we want to do? Why it is within the limits imposed by the Federal Constitution, to establish white supremacy in this State.

I *Official Proceedings* at 8; *see also Journal of the Proceed-*

ings of the Constitutional Convention of the State of Alabama 1776 (1901). In Knox' words, "if we would have white supremacy, we must establish it by law—not by force or fraud." I *Official Proceedings* at 9. Borrowing from the successful methods of the Second Mississippi Plan and those of other states,[8] the suffrage committee set about to achieve this objective by settling on devices that would subvert the guarantees of the fourteenth and fifteenth amendments without directly provoking a legal challenge. In hopes of success, the committee made resort to facially neutral "tests that took advantage of differing social conditions. Property tests, literacy tests, residence requirements, the poll tax, and disqualification for conviction of certain crimes all fell into this category." S. Hackney, *supra*, at 192; *see also* Deposition of J. Morgan Kousser (Pl.Exh. 9).[9] The result was an exceptionally byzantine suffrage scheme. S. Hackney, *supra*, at 193; M. McMillan, *supra*, at 359.[10]

[8]I *Official Proceedings* at 10-13; J. Kousser, *supra*, at 39-40, 189; M. McMillan, *supra*, at 272-75 (Pl.Exh. 12).

[9]In 1898 the Supreme Court held that the Second Mississippi Plan passed muster under the fourteenth amendment. *Williams v. Mississippi*, 170 U.S. 213, 18 S.Ct. 583, 42 L.Ed. 1012 (1898). The Mississippi provisions included a poll tax and a literacy test coupled with an understanding clause as a loophole for poor whites. *Id.* at 217 n. 1, 18 S.Ct. at 585 n. 1.

As the district court noted, the Alabama proposal that the delegates feared was most vulnerable to constitutional attack was the temporary fighting grandfather clause, section 180. Under that clause veterans and their descendants automatically qualified to register until January 1, 1903, when a permanent provision imposing literacy and property restrictions, section 181, took effect. The Supreme Court later confirmed the delegates' fears when it invalidated a similar Oklahoma grandfather clause. *Guinn v. United States*, 238 U.S. 347, 35 S.Ct. 926, 59 L.Ed. 1340 (1915). Adoption of facially neutral and severable measures such as section 182 was a critical line of defense in case other parts of the suffrage plan did not withstand attack. Deposition of J. Morgan Kousser.

[10]Under the permanent plan which took effect on January 1, 1903, Ala. Const. art. VIII, § 181, citizens had to satisfy requirements of sex, age, residence, literacy and gainful employment or property ownership before they could register. *Id.* §§ 177-178, 181. Registered voters further had to pay a cumulative poll tax of $1.50 per year

While there is scant record of the debates over section 182, the sources of the crimes selected for inclusion in and exclusion from section 182 shed light on the motives of its drafters. In enumerating the crimes that would trigger disfranchisement, the suffrage committee chose offenses that were "peculiar to the Negro's low economic and social status," such as petty property offenses, wife-beating and sex-related crimes. P. Lewinson, *Race, Class & Party* 81 & n. 7 (1963) (cited in Pl.Exh. 9); M. McMillan, *supra*, at 275 (Pl.Exh. 12). The crimes selected by the suffrage committee had their origin in an ordinance drafted and submitted by John Fielding Burns, a Black Belt planter. *See* I *Official Proceedings* at 511. According to Dr. McMillan:

> [t]he crimes [Burns] listed were those he had taken cognizance of for years in his justice of the peace court in the Burnsville district, where nearly all his cases involved Negroes. For example, among those [Burns would have] disfranchised were persons guilty of larceny, bigamy, seduction, incest, rape, or attempt to rape, burglary, or attempt to burglarize, vagrancy, wife beating, forgery and "those who are bastards or loafers or who may be infected with any loathsome or contagious disease."

M. McMillan, *supra*, at 275 n. 76. In newspaper accounts, "Burns estimated the crime of wife-beating alone would disqualify sixty percent of the Negroes." J. Gross, *Alabama Politics and the Negro, 1874-1901* 244 (1969) (cited in Pl. Exh. 9).

According to experts for both sides, the evident racial animus of section 182 was used to induce delegates representing poor whites to vote for other provisions in the suffrage article, such as the poll tax, that were contrary to their interests. Whatever the folly of their vote, their perceptions of the disparate impact of section 182 turned out to be cor-

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before they could cast a ballot. *Id.* §§ 178, 194. A three-judge court struck down the Alabama poll tax as violative of the fifteenth amendment in *United States v. Alabama*, 252 F.Supp. 95 (M.D.Ala. 1966) (Rives, J.).

rect. The registrars' expert estimated that by January 1903 section 182 had disfranchised approximately ten times as many blacks as whites. This disparate effect persists today. In Jefferson and Montgomery Counties blacks are by even the most modest estimates at least 1.7 times as likely as whites to suffer disfranchisement under section 182 for the commission of nonprison offenses.[11]

[7] In reviewing this record we are left with a firm and definite impression of error by the court below with respect to the issue of intent. Plaintiffs have more than shouldered their burden of showing that discriminatory intent was a motivating factor in the adoption of section 182; they have presented evidence from which the district court was required to find as a matter of law that discriminatory intent motivated section 182.[12] We therefore turn to the state's burden to demonstrate that the section would still have been adopted had a permissible state reason been the sole consideration.

The registrars rely on a purported state interest in denying the franchise to those convicted of violating its laws. Assuming without deciding that this asserted state interest would pass constitutional muster, we are unable to discern any evidence that the rule was actually intended to serve that interest. *Scheinberg v. Smith*, 659 F.2d 476, 483 n. 2 (5th Cir. Unit B 1981).

In the first place, we note several glaring omissions from the nonprison offenses resulting in disfranchisement under

[11]Because the registrars have not raised the issue whether blacks commit nonprison offenses generally in similarly disproportionate numbers, we do not reach that question.

[12]In fact, the registrars concede the point in brief. They argue, however, that the first prong of *Arlington Heights* is not satisfied because the delegates also intended to deny suffrage to lower-class whites. This is an erroneous reading of the law. Under *Arlington Heights* plaintiffs need only show that racially discriminatory intent was *a* motivating factor behind the challenged legislation. Without question that was done here. The registrars do not advance the denial of the franchise to poor whites as a permissible purpose under the second prong of *Arlington Heights*.

section 182.[13] While underinclusiveness in and of itself does not establish a discriminatory intent, once such intent is shown, underinclusiveness is relevant to whether a second, permissible purpose also motivated the drafters. Had the convention truly wished to vindicate a "good government" purpose, it would have included all crimes not punishable by imprisonment in the penitentiary. *Compare Trimble v. Gordon*, 430 U.S. 762, 768 n. 13, 97 S.Ct. 1459, 1464 n. 13, 52 L.Ed.2d 31 (1977); *O'Brien v. Skinner*, 414 U.S. 524, 530, 94 S.Ct. 740, 743, 38 L.Ed.2d 702 (1974). Nothing in the convention proceedings or the constitution itself suggests a good government purpose. *See Trimble*, 430 U.S. at 768 & n. 13, 97 S.Ct. at 1464 n. 13; *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 641 n. 9, 94 S.Ct. 791, 797 n. 9, 39 L.Ed.2d 52 (1974); L. Tribe, *American Constitutional Law* § 12-8, at 602 & n. 1; *id.* § 16-30, at 1085-88 (1978). Indeed, while it is true that the avowed objective of the suffrage committee was to deny the vote to the corrupt and the ignorant, *see* I *Official Proceedings* at 1257, defendants' expert freely admitted under cross-examination that the phrase the "corrupt and the ignorant" referred specifically to blacks and lower-class whites. The same good government rationale, presented in defense of the Alabama poll tax, a sister provision to section 182, struck the late Judge Rives as nothing more than "ingenious after-thought." *United States v. Alabama*, 252 F.Supp. at 101. We hasten to agree and conclude that the registrars as a matter of law failed to present any

[13]In 1975, the year in which Underwood committed the offense for which he was convicted, nonprison offenses that were neither enumerated in section 182 nor involved moral turpitude and that thus were free from disability included: second-degree manslaughter (carrying a maximum sentence of 12 months and a maximum fine of $500); assault on a police officer (12 months; $1000); assault and battery (6 months; $500); mailing pornography (12 months; $2000); and aiding the escape of a misdemeanant (12 months; $1000). By contrast, Underwood, who was convicted for issuing a worthless $77.41 check, risked a maximum penalty of a $100 fine for a first offense. For repeated offenses, the most serious punishment authorized was a sentence of three months and a fine of $400.

evidence whatsoever of permissible intent. There was no evidence from which the district court could have found that section 182 would have been adopted had a permissible reason been the sole consideration.[14]

We recognize the registrars' good faith in administering the statute without reference to race. Neither their impartiality nor the passage of time, however, can render immune a purposefully discriminatory scheme whose invidious effects still reverberate today.

We hold that section 182 of the Alabama Constitution of 1901 violates on account of race the fourteenth amendment with respect to those convicted of crimes not punishable by imprisonment in the penitentiary. Since those provisions of section 182 that disfranchise nonprison offenders lack legal effect, *Dorchy v. Kansas*, 264 U.S. 286, 289-90, 44 S.Ct. 323, 324, 68 L.Ed. 686 (1924); *see INS v. Chadha*, ____ U.S. ____, 103 S.Ct. 2764, 2775, 77 L.Ed.2d 317 (1983) (citing

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[14]As evidence to the contrary, the state points to *Washington v. State*, 75 Ala. 582 (1884). In that case the Alabama Supreme Court announced in a racially neutral context that the state had the right to preserve the integrity of the vote by disfranchising those who had been convicted of crimes involving moral turpitude. *Id.* at 585. Before this court defendants argue that the holding of that case must have been the motivating force behind section 182 since most of the delegates to the 1901 convention were lawyers and presumably were aware of it. We agree with plaintiffs that this is too attenuated a causal link to prove that section 182, which swept in certain enumerated misdemeanors as well as crimes of moral turpitude, would have appeared in the same form absent racial motive. The decision preceded the convention by seventeen years. Significantly, defendants point to no passage in the proceedings or in the committee report accompanying section 182 that invoked *Washington v. State* as authority for the suffrage provision. As we admonished in *Scheinberg*, 659 F.2d at 483 n. 2, it is improper for us to speculate as to any permissible state purposes that might exist when fundamental rights or the rights of a suspect class are at stake. For the same reason, we cannot give credence to the state's argument that the 1901 expansion of the disabling crimes listed in the 1875 Alabama Constitution demonstrates an affirmation of what the state assumes was the good government purpose of the Redemption-era provision.

Champlin Refining Co. v. Corporation Commission, 286 U.S. 210, 234, 52 S.Ct. 559, 564-65, 76 L.Ed. 1062 (1932)), we do not reach the additional claims that plaintiffs press. The district court shall issue an injunction ordering voter registration upon request by members of plaintiff class who qualify in all other respects for registration on the electoral rolls.

REVERSED and REMANDED with instructions.

APPENDIX G

Notice Of Appeal

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

VICTOR UNDERWOOD AND CARMEN EDWARDS, for themselves and all others similarly situated,	)	
Plaintiffs-Appellants,	)	
V	)	NO. 82-7011
NELL HUNTER, et al, individually and on behalf of all other members of Board of Registrars in the State of Alabama,	)	
Defendants-Appellees.	)	

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Nell Hunter, et al, the defendants-appellees above named, hereby appeal to the Supreme Court of the United States from a final judgment holding that section 182 of the Alabama Constitution of 1901 violates on account of race the Fourteenth Amendment with respect to those convicted of crimes not punishable by imprisonment in the penitentiary entered in this action on April 10, 1984.

This appeal is taken pursuant to Title 28, USC, §1254(2). Dated July 2, 1984.

/s/ JAMES S. WARD

James S. Ward
Special Assistant Attorney General
Attorney for Appellants

COUNSEL

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Suite 302
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(205) 933-7000

CERTIFICATE OF SERVICE

I, James S. Ward, a member of the Bar of The Supreme Court of the United States and counsel of record for Nell Hunter, et al, individually and on behalf of all other members of Board of Registrars in the State of Alabama, appellants herein, hereby certify that on July 2, 1984, I served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States, on each of the parties herein as follows:

On Victor Underwood and Carmen Edwards, for themselves and all others similarly situated, appellees herein, by depositing such copies in the United States Post Office, Birmingham, Alabama, with first class postage prepaid, properly addressed to the post office address of Edward Still and Neil Bradley, the above named appellees counsel of record, at Edward Still, Suite 400, Commerce Center, 2027 First Avenue North, Birmingham, Alabama 35203 and Neil Bradley, ACLU Foundation, 52 Fairlie Street NW, Atlanta, Georgia 30303.

On The Solicitor General, Department of Justice, by depositing such copies in the United States Post Office, Birmingham, Alabama, with first class postage prepaid, properly addressed to the post office address of The Solicitor General, Department of Justice, Washington, DC 20530.

On William Bradford Reynolds, Assistant Attorney General, Charles J. Cooper, Deputy Assistant Attorney General, and Brian K. Landsberg, Esquire, by depositing such copies in the United States Post Office, Birmingham, Alabama with first class postage prepaid, properly addressed to the post office address of William Bradford Reynolds, Assistant Attorney General, Charles J. Cooper, Deputy Assistant Attorney General and Brian K. Landsberg, Esquire, United States Department of Justice, Washington, DC 20530.

On James E. Vandegrift, Clerk of the United States District Court, Northern District of Alabama, by depositing such copies in the United States Post Office, Birmingham, Alabama, with first class postage prepaid, properly addressed

to the post office address of James E. Vandegrift, Clerk of the United States District Court, Northern District of Alabama, Federal Courthouse, 1800-5th Avenue North, Birmingham, Alabama 35203.

All parties required to be served have been served. Dated July 2, 1984.

/s/ JAMES S. WARD

James S. Ward
Special Assistant Attorney General
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AFFIDAVIT OF SERVICE

I, James S. Ward, depose and say that I am an attorney in the law firm of Ward & McKnight and I am the attorney of record for Nell Hunter, et al, individually and on behalf of all other members of Board of Registrars in the State of Alabama, the appellants herein, and that on the 2nd day of July, 1984, I served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States on each of the parties required to be served herein, as follows:

On Victor Underwood and Carmen Edwards, for themselves and all others similarly situated, appellees herein, by depositing such copies in the United States Post Office, Birmingham, Alabama, with first class postage prepaid, properly addressed to the post office address of Edward Still and Neil Bradley, the above named appellees counsel of record, at Edward Still, Suite 400, Commerce Center, 2027 First Avenue North, Birmingham, Alabama 35203 and Neil Bradley, ACLU Foundation, 52 Fairlie Street NW, Atlanta, Georgia 30303.

On The Solicitor General, Department of Justice, by depositing such copies in the United States Post Office, Birmingham, Alabama, with first class postage prepaid, properly addressed to the post office address of The Solicitor General, Department of Justice, Washington, DC 20530.

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On James E. Vandegrift, Clerk of the United States District Court, Northern District of Alabama, by depositing such copies in the United States Post Office, Birmingham,

Alabama, with first class postage prepaid, properly addressed to the post office address of James E. Vandegrift, Clerk of the United States District Court, Northern District of Alabama, Federal Courthouse, 1800-5th Avenue North, Birmingham, Alabama 35203.

All parties required to be served have been served.

/s/ JAMES S. WARD

James S. Ward
Special Assistant Attorney General
Attorney for Appellants

Sworn to and subscribed before
me this the 2nd day of July, 1984.

/s/ EDITH R. LEBERTE

Notary

NO. 84-76

Office - Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1984

NELL HUNTER, Et Al., Individually, And On Behalf Of All Other Members of Boards of Registrars In The State Of Alabama,

Appellants,

vs.

VICTOR UNDERWOOD And CARMEN EDWARDS, For Themselves And All Others Similarly Situated,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MOTION TO AFFIRM

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36 pp

QUESTION PRESENTED

Did the court of appeals err in holding that Section 182 of the 1901 Alabama Constitution was enacted with a racially discriminatory purpose and continues to have a racially discriminatory effect?

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MOTION TO AFFIRM

Appellees, pursuant to Rule 16, hereby move that the judgment of the United States Court of Appeals for the Eleventh Circuit be affirmed on the grounds that the evidence of racial motivation and racial effect of the state constitutional provision at issue is both clear and unchallenged, that the issues raised by the appellants are frivolous, and that the questions are so insubstantial that argument is not warranted.

STATEMENT OF THE CASE

"With the end of Reconstruction, the white citizens of Alabama moved to reassert their once unquestioned political supremacy," and joined the group of eleven states which adopted suffrage restrictions first adopted in 1890 in Mississippi and known as the Second Mississippi Plan. J.S. A-8. "When the Alabama constitu-

tional convention assembled in May 1901, the question was not whether to disfranchise the Negro but rather how to do so constitutionally." J.S. A-9. The convention adopted several suffrage provisions, one of which disfranchised persons convicted of certain crimes--section 182 of the Alabama Constitution of 1901.[1] The appellees, Victor Underwood and Carmen Edwards, challenged this provision's disfranchisement for misdemeanors. The challenge was to misdemeanors included either in a list of crimes or under the rubric of involving moral turpitude in the disfranchising provision. Both appellees had been affected by the operation of §182 for each had been convicted of uttering a worthless instrument (writing an insufficient funds check). Underwood had

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1. The text of this section is found at Jurisdictional Statement, 2-3, hereinafter, J.S. ___.

been purged from the the roll of qualified electors by the Jefferson County Board of Registrars and Edwards had not been allowed to register by the Montgomery County Board of Registrars.

Suit was filed in federal district court on June 21, 1978 against the registrars of Jefferson and Montgomery County. The plaintiffs and defendants were both certified as class representatives. J.S. D-2. Five causes of action were presented. The only one which was ruled on by the court of appeals and presented for review here, is the claim that section 182 was specifically adopted to disfranchise blacks on account of race and has had and continues to have that effect.[2]

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2. The complaint also alleged that the fundamental right to vote on an equal basis with other citizens was being denied

The evidence showed that the 1901 suffrage provisions were racially motivated and that they had a disparate impact in 1903 and in the four year period prior to filing suit--1974-78.

The evidence presented by the defendant registrars was basically the same as plaintiffs. They defended the case on the theory that the 1901 suffrage provisions were valid because they were passed "with the purpose to disfranchise poor whites equally with blacks." J.S. 17.

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without a compelling state interest, that the disfranchisement provisions were a discriminatory denial of equal protection, and that the moral turpitude provision was vague and indefinite. The complaint was later amended to allege that the suffrage provisions of the 1901 constitution violated the Act of Readmission, Act of June 25, 1868, ch. 70, 15 Stat. 74. The district court ruled against plaintiffs on all causes of action, and all were properly presented and argued to the court of appeals. Plaintiffs, appellees here, contend that the record supports their claims on all causes of action, and would rely upon all claims as alternative grounds to support the judgment of the court of appeals.

The district court found the suffrage provisions constitutional. First, it said, "[t]here is simply nothing in the legislative history to lead one to decide that the provisions disenfranchising those convicted of crimes are based upon the racism present at the constitutional convention." J.S. E-5. It also concluded that the state had a valid state interest in disfranchising those convicted of violating its laws, and then concluded that if a state enactment has a dual motivation, "an impermissible legislative motive standing alone will not invalidate legislation for which there is a permissible basis." J.S. E-5. The district court made no findings on racial effect.

The court of appeals reversed, finding that the district court had "brought its inquiry to a premature end." J.S. A-6. To the district court, the presence of a permissible motive ended

the inquiry. The court of appeals stated that the law is "that the existence of an illicit legislative motive does not automatically result in a conclusion of unconstitutionality." J.S. A-7, n. 7 (emphasis in original). The court of appeals correctly applied the appropriate legal standard as set out in this Court's decisions.

First, it held that for plaintiffs to establish a successful fourteenth amendment claim in matters affecting the elective franchise, they must establish an intent to abridge the franchise on account of race, citing City of Mobile v. Bolden, 446 U.S. 55 (1980) (plurality opinion), and Washington v. Davis, 426 U.S. 229 (1976). If mixed motives are involved, defendants must prove by a preponderance of the evidence that the same decision would have been made had the impermissible purpose not been considered, citing Village of Arlington Heights v. Metropol-

itan Housing Development Corp., 429 U.S. 252 (1977), and Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977). It then held that in matters involving discrimination on the basis of race, the permissible motivating interest articulated by the state must be compelling, citing Crawford v. Board of Education, 458 U.S. 527 (1982), and the means employed must be precisely drawn to accomplish exactly the objective that the state purports to further, citing Kramer v. Union Free School District, 395 U.S. 621 (1969). J.S. A-5, A-6.

Turning to the case at hand, the court of appeals made a thorough review of the record showing the motivation for both the entire convention and the suffrage provisions in particular, noting that the expert witnesses for both sides testified that these motivations must be viewed as a whole. Relying upon official proceedings

of the convention introduced into evidence, scholarly works,[3] the testimony of experts for both sides and other exhibits, the court of appeals found the racial motivation clear.

The end of Reconstruction opened the way for "the white citizens of Alabama...to reassert their once unquestioned political supremacy. The 1890's ushered in an era of disfranchisement not only in Alabama but throughout the South." J.S. A-8. With the rise of populism in the 1890s the black vote had acquired added leverage. Ibid. The court of appeals, in part relying upon the decision of United States v. Alabama, 252

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3. C. Woodward, Origins of the New South 1877-1913 (1971); S. Hackney, Populism to Progressivism in Alabama (1969); M. McMillan, Constitutional Development in Alabama, 1798-1901: A Study in Politics, the Negro, and Sectionalism (1955); and J. Kousser, The Shaping of Southern Politics (1974).

F. Supp. 95, 98 (M.D. Ala. 1966) (three-judge court), found that "[w]hites, Democrats and Populists alike, vied for black ballots in any way they could, with favors, pardons of convictions, outright vote purchase and massive electoral fraud." Both courts below agreed that the turn of the century conventions were spurred on by a concern of federal intervention, J.S. A-8, E-3, especially by the narrow defeat of the Lodge force bill in the Senate in 1890, which called for tighter federal control of all phases of voting, from registration to ballot tabulation. The most effective way to avoid federal intervention, the reformers believed, was to eliminate the Negro vote. According to the court of appeals:

> In the words of one delegate to the 1901 convention, "Now we are not begging for 'ballot reform' or anything of that sort, but we want to be relieved of purchasing the Negroes to carry elections. I want cheaper votes."...

> When the Alabama constitutional convention assembled in May 1901, the question was not whether to disfranchise the Negro but rather how to do so constitutionally. In his opening address John B. Knox, the president of the convention, declared:
>
> > And what is it that we want to do? Why it is[,] within the limits imposed by the Federal Constitution, to establish white supremacy in this State.
>
> 1 Official Proceedings [of the Constitutional Convention of the State of Alabama, May 21st, 1901 to September 3rd, 1901] at 8;... In Knox' words, "if we would have white supremacy, we must establish it by law--not by force or fraud." I Official Proceedings at 9.

J.S. A-9.

The court of appeals found that the suffrage committee, borrowing from the successful methods of the Second Mississippi Plan and those of other states, sought to achieve the convention's objective "by setting on devices that would subvert the guarantees of the fourteenth amendment without directly provoking a legal challenge." J.S. A-9. Multiple devices were adopted because of a concern

that one or more of the methods might be held invalid. The court of appeals noted that this was a well-founded fear, for a grandfather clause similar to Alabama's was struck down in Guinn v. United States, 238 U.S. 347 (1915) and Alabama's poll tax was held unconstitutional in United States v. Alabama, 252 F. Supp 95 (M.D. Ala. 1966) (three-judge court). J.S. A-10, ns. 9 and 10.

While there was scant record in the debates over the adoption of section 182, the court of appeals found the source of the crimes included and excluded in the section shed light on the motives of the drafters.

> The crimes selected by the suffrage committee had their origin in an ordinance drafted and submitted by John Fielding Burns, a Black Belt planter. See I Official Proceedings at 511. According to Dr. McMillan:
>
> > [t]he crimes [Burns] listed were those he had taken cognizance of for years in his justice of the peace

> court in the Burnsville district, where nearly all his cases involved Negroes. For example, among those [Burns would have] disfranchised were persons guilty of larceny, bigamy, seduction, incest, rape, or attempt to rape, burglary, or attempt to burglarize, vagrancy, wife beating, forgery and "those who are bastards or loafers or who may be infected with any loathsome or contagious disease."
>
> M. McMillan, supra, at 275 n. 76. In newspaper accounts, "Burns estimated the crime of wife-beating alone would disqualify sixty percent of the Negroes." J. Gross, Alabama Politics and the Negro, 1874-1901 244 (1969) (cited in Pl. Exh. 9).

J.S. A-10, A-11.

The court of appeals also found that according to the experts for both sides, "the evident racial animus of section 182 was used to induce delegates representing poor whites to vote for other provisions in the suffrage article, such as the poll tax, that were contrary to their interests." J.S. A-11.

The court found that the "[p]laintiffs have more than shouldered their burden of showing that racially dis-

criminatory intent was a motivating factor in the adoption of section 182," and that the registrars conceded the point in their brief. J.S. A-11 and n. 12. The registrars repeat that concession in their jurisdictional statement, arguing that "the entire suffrage article had the intention to disenfranchize poor whites equally as well as blacks." J.S. 10. (Emphasis theirs.)

The evidence showed that section 182 had a racially discriminatory impact at the time of adoption and currently. According to the defendants' expert witness, Dr. J. Mills Thornton, who had reviewed statistics regarding the race of those incarcerated in 1901, section 182 had disfranchised more than 12,000 blacks and about 1,000 whites. See transcript of July 21, 1981, 78-79. Appellees also introduced analyses of the Montgomery and Jefferson County registrars' records of

persons purged from the roll of voters because of convictions covered by section 182. No evidence was offered by the registrars on this issue. The court of appeals found that the intended racial effect continued to the present:

> [The convention delegates'] perception of the disparate impact of section 182 turned out to be correct. The registrars' expert estimated that by January 1903 section 182 had disfranchised approximately ten times as many blacks as whites. This disparate effect persists today. In Jefferson and Montgomery Counties blacks are by even the most modest estimates at least 1.7 times as likely as whites to suffer disfranchisement under section 182 for the commission of non-prison offenses.

J.S. A-11.

Having found the record clearly established both a racially discriminatory motivation and impact, the court of appeals turned to "the state's burden to demonstrate that the section would still have been adopted had a permissible state reason been the sole consideration." J.S. A-11, A-12. The registrars argued that

the state had an interest in denying the franchise to those convicted of violating its laws, but the court of appeals concluded that it was "unable to discern any evidence that the rule was actually intended to serve that interest." J.S. A-12.

The court of appeals noted that there were glaring omissions in the disfranchisement provision, serious offenses being omitted, indicating an inconsistency with the theory that a "good government" purpose lie behind the law. But beyond that, the court said, there was nothing in the convention proceedings or the constitution itself to suggest a good government purpose. J.S. A-12.

> Indeed, while it is true that the avowed objective of the suffrage committee was to deny the vote to the corrupt and the ignorant, see I Official Proceedings at 1257, defendants' expert freely admitted under cross-examination that the phrase the "corrupt and the ignorant" referred

specifically to blacks and lower-class whites.

J.S. A-13.[4]

The court of appeals had no need to reach the balancing test of Arlington Heights to determine if section 182 would have been adopted in the absence of the racially discriminatory motive, because it found that there had been no permissible

---

4. The court of appeals also rejected the state's argument that a state supreme court decision, Washington v. State, 75 Ala. 583 (1884) provided a legitimate state interest for the convention in 1901. That decision, seventeen years prior to the convention, held that disfranchisement of those convicted of crimes involving moral turpitude was within the state's right to protect the integrity of the vote. The state argued that most convention delegates were lawyers and therefore must have been aware of that decision. The court of appeals found this theory of causation too attenuated, and also ruled that when fundamental rights are at issue, it is up to the state to prove its motivations, it being impermissible for a court to speculate as to what permissible state motives might exist, citing Scheinberg v. Smith, 659 F.2d 476, 483 n. 2 (5th Cir. Unit B 1981). J.S. A-13, n. 14.

motive established in the record.[5] "There was no evidence from which the district court could have found that section 182 would have been adopted had a permissible reason been the sole consideration." J.S. A-13. It concluded that there was nothing present which could "render immune a purposefully discriminatory scheme whose invidious effects still reverberate today," and reversed and remanded. J.S. A-13, A-14.

The appellants unsuccessfully sought a stay of the mandate from the court of

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5. The court of appeals noted that it was the appellants' position that the first prong of Arlington Heights had not been proved because the delegates also intended to disfranchise lower class whites, a view it rejected as an "erroneous reading of the law." J.S. A-11, 12. In effect this is an argument that the presence of a permissible motive negates the existence of an impermissible motive. The court of appeals also stated that "[t]he registrars do not advance the denial of the franchise to poor whites as a permissible purpose under the second prong of Arlington Heights. Ibid.

appeals, from Justice Powell, and sought to have the district court delay entering injunctive relief. On June 12, 1984, the district court entered an order enjoining all registrars in Alabama from enforcing section 182 insofar as it applies to misdemeanors.

Summary of Argument

Once the plaintiffs proved that section 182 of the Alabama Constitution of 1901 was intended to discriminate against blacks and had the intended effect, they established a prima facie violation of the fourteenth amendment.

It order to rebut that showing, the state had the burden of establishing that its restriction of the elective franchise served a compelling state interest by the least restrictive means available, and would have been adopted without regard to the racially discriminatory motive.

Neither the tenth nor the fourteenth amendment provides the state the authority to discriminate on the basis of race regarding the elective franchise.

The registrars defended the case on an incorrect view of the law. They believed that any permissible motive for adopting section 182 would automatically vitiate any discriminatory motive, and that an attendant intent to discriminate against poor whites cancelled out, in effect, the intent to discriminate against blacks.

The court of appeals correctly held that the registrars failed to establish that there was any legitimate reason for adopting section 182, and that the proof of racially discriminatory purpose and effect rendered it violative of the fourteenth amendment.

Argument

Section 182 Was Adopted With The Intent, And Has Had The Effect, Of Disfranchising Proportionately More Blacks Than Whites.

This case presents a fairly simple issue. The appellant registrars argue that even though the 1901 constitutional convention adopted the petty crimes provision for the purpose of disfranchising substantially all blacks, the provision does not violate the equal protection clause of the fourteenth amendment because there was also an intent to disfranchise some whites, i.e., poor whites. Their defense has no merit because (a) what is being infringed involves both race and the elective franchise and (b) discrimination against poor whites would not stand up under scrutiny as a compelling state interest.

The evidence showed, and the court of appeals so found, that the intent to discriminate against black persons by the

adoption of section 182 was clear. Given the historical record established by appellees, it cannot be said that the court of appeals was in error in finding a clear intent to discriminate, and appellants do not contend otherwise. Indeed, the element of intent, while necessary to establish a fourteenth amendment claim, was never really in dispute in this litigation and it is not an issue before this Court. The appellants adhere to their previous position in their argument for review--"the entire suffrage article had the intention to disenfranchise poor whites equally as well as blacks." J.S. 10. (Emphasis theirs.)

The evidence also showed, and the court of appeals so found, that section 182 had the intended discriminatory effect by 1903 and continues to have that effect today. J.S. A-11. Again, the appellants do not contend otherwise. Their defense

has always been concerned only with motives. The stark disparate racial impact remains unchallenged.

The court of appeals explicitly found that appellees had established a prima facie case: "In reviewing this record we are left with a firm and definite impression of error by the court below with respect to the issue of intent. Plaintiffs have more than shouldered their burden of showing that discriminatory intent was a motivating factor in the adoption of section 182..." J.S. A-11.[6] Having shown that appellees were denied the right to participate in elections on an equal basis with other citizens of the jurisdiction, they established a violation

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6. In so reversing the finding of the district court, the court of appeals used the test appropriate to reversing a finding of fact as clearly erroneous under Rule 52, F.R.Civ.P., United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948). See also, J.S. A-6.

of a constitutionally protected right, Dunn v. Blumstein, 405 U.S. 330, 336 (1972) a "'fundamental political right,... preservative of all rights.'" Reynolds v. Sims, 377 U.S. 533, 562 (1964). Before this right can be restricted, "the purpose of the restriction and the assertedly overriding interests served by it must meet close constitutional scrutiny." Evans v. Cornman, 398 U.S. 419, 422 (1970). To restrict the elective franchise, the state must demonstrate that the restriction is "necessary to promote a compelling governmental interest," and "if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose 'less drastic means.' Shelton v. Tucker, 364 U.S. 479, 488 (1960)," Dunn v. Blumstein, at 342, 343.

The state has to establish one other evidentiary element in a case such as this where the intent to discriminate in the right to the elective franchise has been prima facie established. It was required to show by a preponderance of the evidence that, if it had a permissible motive in adopting the restriction, the restriction would have been adopted even in the absence of the discriminatory motive. Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977). The court of appeals correctly held the state to this standard. J.S. A-5 to A-7.

The existence of a compelling state interest, i.e., a permissible motive, is not a matter for conjecture or theory by the state's lawyers. It must be one actually held by the state as evidenced by an authoritative state body, either the legislature or the state court. The court of appeals so held, J.S. A-13, n. 14, and

this holding conforms to the holding of Sherbert v. Verner, 374 U.S. 398, 407 (1963).[7]

The registrars here argue that there were, in addition to racial motives, two non-racial reasons for adopting section 182--to disfranchise poor whites and to deny the franchise to those convicted of violating its laws. Quite apart from the tautology that discrimination aimed at all blacks and some whites remains discrim-

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7. In Sherbert v. Verner, 374 U.S. 398, 407 (1963), this Court refused even to assess a proffered justification for infringment of first amendment rights because it had not been made to the state supreme court. The opinion went on to state "there is no proof whatever to warrant such fears...as those which the respondents now advance [and] it would plainly be incumbent upon the [state] to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights." Cf., Michael M. v. Superior Court of Sonoma County, 450 U.S. 464, 470 (1981) (legislative purpose had been presented to and accepted by the highest court of the state) (plurality opinion).

ination against blacks, discrimination in the entitlement to the elective franchise (in other than elections of special interest because of wealth) must serve a compelling state interest, Hill v. Stone, 421 U.S. 289, 298 (1975). The registrars have not as yet articulated what compelling state interest it is which is served by disfranchising poor whites, and none is readily apparent.[8]

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8. It is not at all clear that the registrars are actually arguing that disfranchising poor whites is a permissible reason for adoption of section 182. They have consistently argued that the presence of this motive negates the finding that there was racial motivation under the first prong of Arlington Heights. The court of appeals acknowledged, and rejected this argument, and pointed out that "[t]he registrars do not advance the denial of the franchise to poor whites as a permissible purpose under the second prong of Arlington Heights." J.S. A-11, n. 12. The registrars take exception to this statement of the court of appeals. J.S. 17. They argue that "the State demonstrated that section 182 would have passed even in the absence of

The latter interest claimed might fit a category this Court has described as "a formidable-sounding state interest." Dunn v. Blumstein, at 345. But like the officials in Dunn, the registrars here simply did not prove their defense. The court of appeals found no evidence in the record that the Convention intended any "good government" reasons for the expansion of the list of disfranchising crimes. J.S. A-12.

The registrars argue that Washington v. State, 75 Ala. 582 (1884), provides a "good government" rationale. This argument is faulty for several reasons. First, there is no record that anyone mentioned Washington v. State in the debates of 1901, while schemes to disfranchise blacks were openly discussed. J.S. A-13,

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any alleged racial motive." Ibid. They apparently view discrimination aimed at poor whites and all blacks as a non-racial motive, but are unwilling to actually argue that this is a permissible motive.

n. 14. Second, as the court of appeals noted, a "good government" rationale is undercut by the omission of misdemeanors relatively more serious than writing a bad check, e.g., second degree manslaughter, assault on a police office, assault and battery, mailing pornography, and aiding the escape of a misdemeanant. J.S. A-12, n. 13. Third, as the court of appeals found, the registrars' expert witness freely admitted that in the convention debates, the phase the "corrupt and the ignorant" referred to blacks and lower class whites. J.S. A-13.

The registrars argue that the tenth amendment leaves the states an unfettered hand in the regulation of the elective franchise, quoting a sentence from Kusper v. Pontikes, 414 U.S. 51, 57 (1973). J.S. 11, 12. Kusper did not so hold, and the sentence from that opinion immediately following the appellants' quote makes that

clear: "[I]n exercising their powers of supervision over elections and in setting qualifications for voters, the States may not infringe upon basic constitutional protections." 414 U.S. at 57. Likewise the registrars' reliance upon Richardson v. Ramirez, 418 U.S. 24 (1974) avails them nothing, for whatever the power of states to disfranchise persons convicted of crimes, they cannot discriminate on the basis of race in the exercise of that power.

The court of appeals was correct in rejecting the defenses suggested by the registrars. The registrars simply defended section 182 under an erroneous view of the law. They believed that the existence of any allegedly non-racial motive attendant to a conceded racial motive would sustain the constitutionality of section 182. The court of appeals thoroughly examined the record to find any

basis for the registrars' defenses. J.S. A-11 to A-13. This examination revealed no evidence either that a permissible motive existed for the adoption of section 182 or that section 182 would have been adopted in the absence of the racially discriminatory motive.

Conclusion

The decision below should be affirmed because the court of appeals followed the appropriate analysis under precedents of this Court and its judgment is completely supported by the evidence and the law. For the reasons stated above, appellees respectfully request that this Court summarily affirm the judgment of the court of appeals without the necessity of any further argument. No substantial question has been presented.

Respectfully submitted,

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No. 84-76 (3)

IN THE

Supreme Court Of The United States

October Term, 1984

NELL HUNTER, et al, individually, and on behalf of all other members of Board of Registrars in the State of Alabama,
Appellants,

vs.

VICTOR UNDERWOOD and CARMEN EDWARDS, for themselves and all others similarly situated,
Appellees.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JOINT APPENDIX

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APPEAL DOCKETED JULY 9, 1984.
PROBABLE JURISDICTION NOTED OCTOBER 9, 1984.

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Opinion of the United States Court of Appeals for the Eleventh Circuit, April 10, 1984, which is the judgment in question, is printed in the Appellants' Jurisdictional Statement heretofore filed, at Appendix A.

Memorandum Opinion of the United States District Court for the Northern District of Alabama, August 11, 1978, a relevant opinion, is printed in the Appellants' Jurisdictional Statement heretofore filed, at Appendix D.

Memorandum Opinion of the United States District Court for the Northern District of Alabama, December 23, 1981, a relevant opinion, is printed in the Appellants' Jurisdictional Statement heretofore filed, at Appendix E.

RELEVANT DOCKET ENTRIES

	Date
Complaint filed	June 21, 1978
Motion of plaintiffs for preliminary injunction filed	June 21, 1978
On hearing on motion of plffs for preliminary injunction before the Hon. Frank H. McFadden – Oral motion of plffs to admit Neil Bradley Pro Hac Vice – Granted – Testimony of plaintiffs – Plffs rest – Oral motion of defts for directed verdict – Ruling reserved – Testimony of defts – Defts rest – Rebuttal testimony of plffs – Plffs rest – Argument of counsel on motion of deft to dismiss – All matters taken under advisement	July 19, 1978
Clerk's Court Minutes that matter of preliminary injunction is taken under advisement and motion of defts to dismiss is taken under advisement; written findings of fact, conclusions of law and judgment to be entered by the court – filed and entered	July 19, 1978
Memorandum Opinion – filed and entered	August 11, 1978
ORDER that plffs' motion for preliminary injunction is overruled; further that defts' motion to dismiss is granted in part and causes of action numbered I, II and III are dismissed; further that defts' motion for stay is granted; further that plffs' motion for admission of additional exhibits is granted; ruling on the motion to dismiss as to the fourth cause of action is held in abeyance pending further briefs; any such briefs should be submitted within 20 days of the date of this order – filed and entered	August 11, 1978
Memorandum opinion dated February 2, 1979 filed and entered	February 5, 1979
ORDER dated February 2, 1979 in accordance with the memorandum opinion entered contemporaneously	

Date

that defendants's motion to dismiss is granted with respect to plaintiffs' fourth cause of action; further that the other causes of action having been heretofore dismissed, the case is dismissed, with costs taxed against the plaintiffs filed and entered ..... February 5, 1979

Notice of appeal of plaintiffs from the final judgment entered on February 2, 1979 filed ..... February 23, 1979

Transcript of proceedings had before the Honorable Frank H. McFadden in Birmingham, Alabama on July 19, 1978 filed ..... April 2, 1979

Motion of defendants for summary judgment, filed ..... October 15, 1979

Opposition of plffs to defendants' motion for summary judgment, filed ..... October 19, 1979

Motion of plffs to certify the class action allegation, filed ..... October 25, 1979

Certified copy of judgment, USCA, issued as and for the mandate on Oct. 29, 1979, that the judgment of the District Court is VACATED in part and REVERSED in part; and the same is REMANDED to the District Court in accordance with the opinion of Court; it is further ORDERED that the defts-appellees pay to the plffs-appellants the costs on appeal, to be taxed by the Clerk of Court — filed ..... November 2, 1979

Motion of plffs for preliminary injunction, filed ..... January 5, 1980

Response of defendants to plff's motion for preliminary injunction, filed ..... January 16, 1980

NOTICE OF INTERLOCUTORY APPEAL given by Plaintiffs from the denial de facto of the motion for preliminary injunction filed in this action on the 15th day of January, 1980 — filed ..... February 7, 1980

Date

Memorandum Opinion, filed ..... February 14, 1980

ORDER in accordance with the Memorandum Opinion entered contemporaneously that plffs' motion for preliminary injunction is OVERRULED, filed; entered 02-14-80 ..... February 14, 1980

Certified copy of ORDER from U. S. Court of Appeals for the Fifth Circuit that the motion of appellants for an injunction pending appeal is DENIED, filed, filed February 19, 1980 ..... March 28, 1980

ORDER dated April 17, 1980, that Counts one, two and three of the complaint are dismissed in accordance with the Memorandum Opinion entered by the Court August 11, 1978—further that the remaining Count in this action, Count four, be maintained by plffs as a class action on behalf of persons as set out in this order—further that the suit may be maintained against the defts as a class representing all members of the sixty-seven county boards of registrars in the State of Alabama, filed; entered 04-18-80 ..... April 18, 1980

Certified copy of judgment, U. S. Court of Appeals, dated July 15, 1980, and issued as mandate September 11, 1980, affirming the order of the District Court and ordering that plaintiffs-appellants pay to defendants-appellees the costs on appeal to be taxed by the Clerk, USCA, with certified copy of opinion, bill of costs, original record and two supplemental records attached (Kravitch, Henderson and Reavley, Circuit Judges) — filed ..... September 15, 1980

Motion of the plffs for leave to amend the complaint with amendment thereon, filed — 05-15-81 GRANTED; Entered 05-15-81 ..... April 24, 1981

ANSWER of the defts to the complaint, filed ..... May 6, 1981

Motion of the defts to dismiss or in the alternative, Motion to strike plffs' motion to amend complaint

Date

by adding a fifth cause of action, filed — 05-15-81 OVERRULED; Entered 05-15-81 ..... May 8, 1981

Request of the plffs for admission by the defts with exhibits attached, filed ..... May 12, 1981

Motion of the defts to dismiss fifth cause of action, filed ..... June 5, 1981

ORDER ON PRE-TRIAL HEARING held May 11, 1981, dated July 2, 1981, that Joseph J. Trucks is DISMISSED as pty deft, filed; Entered 07-08-81 ..... July 6, 1981

On trial before the Hon. Frank H. McFadden — Argument of counsel on motion of defendants for summary judgment — oral order overruling motion of defendant for summary judgment for failure to exhaust administrative remedies and holding motion of defendant to dismiss fifth cause of action in aveyance entered — Motion of defendants to amend answer to fourth cause of action filed — Oral order granting motion to amend answer entered — Evidence of plaintiffs presented (no testimony) — Plaintiffs rest — Oral motion — Oral motion of defendants to dismiss — Ruling reserved — Testimony of defendants — Defendants rest — Taken under advisement ..... July 21, 1981

Clerk's Court Minutes dated July 21, 1981 that this case is taken under advisement; written findings of fact, conclusions of law and judgment to be entered by the court; filed; Entered 07-22-81 ..... July 22, 1981

ORDER (NOTICE OF ACTION RAISING THE QUESTION OF CONSTITUTIONALITY OF A STATUTE OF THE UNITED STATES) that pursuant to 28:2403 the court certified the Attorney General that there is drawn in question in this case the constitutionality of the Act of June 25, 1868, ch. 70, 15 Stat. 73, filed; Entered 07-29-81 ..... July 29, 1981

Date

Memorandum Opinion filed;
entered 12/23/81 ..... December 23, 1981

ORDER in accordance with the memorandum of opinion that judgment is granted in favor of the defendants and that the complaint is DISMISSED; costs taxed to the plaintiffs, filed;
entered 12/23/81 ..... December 23, 1981

Notice of appeal of plffs from the final judgment entered on 4/18/80 and
12/23/81 filed ..... December 29, 1981

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

VICTOR UNDERWOOD and CARMEN EDWARDS, for themselves and all others similarly situated	)	
PLAINTIFFS,	)	
vs.	)	CA78 M0704S
NELL HUNTER, JOSEPH J. TRUCKS, individually and as members of the Board of Registrars of Jefferson Co., and THOMAS A. JERNIGNAN, CLARICE B. ALLEN, CLEO F. CHAMBERS, individually and as members of the Board of Registrars of Montgomery Co., on behalf of all other members of Boards of Registrars in the State of Alabama	)	
DEFENDANTS.	)	

COMPLAINT

1. This action arises under the First, Fifth, Thirteenth, Fourteenth and Fifteenth Amendments of the Constitution of the United States and 42 U.S.C. §§1971, 1973, 1981 and 1983. Jurisdiction is vested in this Court by 28 U.S.C. §§1331(a), 1343(3) and (4), and 2201. The matter in controversy exceeds, exclusive of interests and costs, the sum of ten thousand dollars. This is an action for appropriate equitable relief and declaratory judgment of the unconstitutionality of *Ala. Const.*, Art. VIII, §182 (1901), to the extent that it disqualifies from

being registered or voting persons convicted of certain offenses, and to prevent deprivation under color of state law, statute, ordinance, regulation, custom or usage of rights, privileges and immunities secured to plaintiff, including the rights to due process, equal protection, and the unabridged participation in the electoral process protected by the First, Fifth, Thirteenth, Fourteenth, and Fifteenth Amendments of the Constitution of the United States and by Title 42 of the United States Code, §§1971, 1973, 1981 and 1983.

2. Plaintiff Victor Underwood is a white citizen of Alabama, over the age of 21 years, and a resident of Jefferson County.

3. Plaintiff Carmen Edwards is a black citizen of Alabama, over the age of 19 years, and a resident of Montgomery County.

4. Defendants Nell Hunter and Joseph J. Trucks are members of the Board of Registrars of Jefferson County. There is presently a vacancy on said board. Defendants Thomas A. Jernignan, Clarice B. Allen, and Cleo F. Chambers are members of the Board of Registrars of Montgomery County. All defendants are sued individually and in their official capacities as members of the Boards of Registrars, and as representatives of the class of all members of the Boards of Registrars of the counties of the State of Alabama.

5. Attorney General William Baxley shall be served a copy of this complaint so that he may defend the constitutionality of the State Constitution provision challenged herein. 28 U.S.C. §2403(b); *Ala. Code*, §6-6-227 (1975).

6. The plaintiffs bring this action on their own behalf and on behalf of all others similarly situated and against the defendants in their official capacities, as individuals and as representatives of their class pursuant to Rule 23 of the F.R.Civ.P. The plaintiffs' class includes all persons disqualified from being registered or voting by operation of *Ala. Const.*, Art. VIII, §182 (1901). The defendants' class includes members of boards of registrars of Alabama. The prerequisites of subsections (a) and (b) (2) of Rule 23 are satisfied. There are common questions of law and fact affecting the several rights

of citizens to register and to vote. The members of the classes are so numerous as to make it impracticable to bring them all before this Court. The claims or defenses of the parties are typical of the claims or defenses of the classes as a whole. A common relief is sought. The interests of each class are adequately represented by the named parties, and the parties opposing each class have acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive and declaratory relief with respect to the class as a whole.

7. *Ala. Const.*, Art. VIII, §182 (1901), disenfranchises persons who have been convicted of certain named offenses, any crime punishable by imprisonment in the penitentiary, or any infamous crime or crime involving moral turpitude. Because any crime carrying a maximum penalty of more than one year is "punishable by imprisonment in the penitentiary," only certain offenses carrying a penalty of 12 months or less, or a fine (hereinafter referred to as misdemeanors and minor felonies) are disenfranchising offenses, namely, the ones listed in §182 and those "involving moral turpitude."

8. Victor Underwood was a duly qualified and registered voter in Jefferson County. Because of a conviction for issuing a worthless check, his name was purged from the registration rolls by the Jefferson County Board of Registrars. Carmen Edwards is otherwise qualified to register to vote in Montgomery County but has been denied registration by the Montgomery County Board of Registrars because of her conviction for issuing a worthless check, an offense which is considered to be a "crime involving moral turpitude."

9. There is between the parties an actual controversy as herein set forth. The plaintiffs and others similarly situated and affected on whose behalf this suit is brought suffer irreparable injury by reason of the acts herein complained of. Plaintiffs have no plain, adequate or complete remedy to redress the wrongs and unlawful acts herein complained of other than this action for a declaration of rights and an injunction. Any remedy to which plaintiffs and those similarly situated could be

remitted would be attended with such uncertainties and delays as to deny substantial relief, would involve multiplicity of suits and cause them further irreparable injury, damage and inconvenience.

FIRST CAUSE OF ACTION

10. The misdemeanors and minor felonies listed in §182 as disenfranchising offenses unconstitutionally impinge upon the franchise because they deny the franchise without a compelling state interest in violation of the First, Fifth, and Fourteenth Amendments of the Constitution of the United States.

SECOND CAUSE OF ACTION

11. The misdemeanors and minor felonies listed in §182 as disenfranchising offenses deny plaintiffs and the class they represent the equal protection of the laws as guaranteed by the Fourteenth Amendment of the Constitution of the United States because more serious offenses are not disabling.

THIRD CAUSE OF ACTION

12. Disfranchisement for conviction of a "crime involving moral turpitude" is based on a definition that is vague and indefinite and denies plaintiffs and the class they represent the right to register and to vote in violation of the First, Fifth, and Fourteenth Amendments of the Constitution of the United States.

FOURTH CAUSE OF ACTION

13. The list contained in §182 was specifically adopted because of its supposed disproportionate impact on blacks, with the intent to disfranchise blacks.

14. The disfranchising provisions of §182 abridge the right to vote on the basis of race, in violation of the First, Fifth, Thirteenth, Fourteenth and Fifteenth Amendments of the Constitution of the United States, and 42 U.S.C. §§1981 and 1983.

RELIEF

WHEREFORE, Plaintiffs respectfully pray that this Court will take jurisdiction of this cause and do the following:

A. Find that the named plaintiffs and defendants are adequate representatives of their respective classes and allow this cause to proceed as a class action;

B. Grant the plaintiffs a preliminary injunction, to be made permanent later, requiring that they and the class they represent be restored to the rolls of those registered to vote or be allowed to register without regard to *Ala. Const.*, Art. VIII, §182 (1901);

C. Declare *Ala. Const.*, Art. VIII, §182 (1901), to be unconstitutional insofar as it applies to offenses carrying a penalty of one year or less, and enjoin its further application;

D. Grant the plaintiffs their costs and reasonable attorneys' fees and expenses.

Submitted by,

/s/ EDWARD STILL

Edward Still
601 Title Building
Birmingham, AL 35203
205/322-1694

Of Counsel
Laughlin McDonald
Neil Bradley
Christopher Coates
52 Fairlie Street, NW
Atlanta, GA 30303

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

VICTOR UNDERWOOD and CARMEN EDWARDS, for themselves and all others similarly situated	)	
Plaintiffs	)	
v	)	CASE NO. CA 78 M0 704S
NELL HUNTER, JOSEPH J. TRUCKS, individually and as members of the Board of Registrars of Jefferson Co., and THOMAS A. JERNIGAN, CLARICE B. ALLEN, CLEO F. CHAMBERS, individually and as members of the Board of Registrars of Montgomery Co., on behalf of all other members of Board of Registrars in the State of Alabama	)	
Defendants	)	

ANSWER

Come now the Defendants in the above captioned case and for answer to Fourth Cause of Action in the Complaint say as follows:

FOURTH CAUSE OF ACTION

1. Defendants deny all the averments and allegations contained in paragraph 13 of the Fourth Cause of Action.

2. Defendants deny all the averments and allegations contained in paragraph 14 of the Fourth Cause of Action.

3. Defendants deny that the Plaintiffs are entitled to any relief.

AFFIRMATIVE DEFENSES

1. For that the Fourth Cause of Action fails to state a claim or cause of action against the Defendants upon which relief can be granted.

2. For that the State of Alabama may constitutionally exclude from the franchise felons or individuals who have committed crimes involving moral turpitude.

3. For that the State of Alabama has a compelling state interest in excluding from the franchise felons or those individuals who have been convicted of crimes involving moral turpitude.

4. For that the disinfranchisement of those convicted of felonies or crimes involving moral turpitude bears a rational relationship to the achieving of a legitimate state interest.

5. Based on an opinion rendered by the Attorney General of the State of Alabama which holds that conviction of a municipal ordinance will not disqualify a person from voting even if such conviction would constitute a crime involving moral turpitude if prosecuted under state law, the Plaintiffs have no standing to bring this action or to serve as class representatives.

Respectfully submitted

/s/ JAMES S. WARD

James S. Ward
Special Assistant Attorney General
for Defendants
1933 Montgomery Highway
Birmingham, Alabama 35209
939-0275

CERTIFICATE OF SERVICE

I certify that I have served a copy of the above and foregoing Answer upon the Honorable Edward Still, Commerce

Center, Suite 400, 2027 1st Avenue North, Birmingham, Alabama 35203, by placing a copy of same in the United States mail, postage prepaid and properly addressed on the 6 day of May, 1981.

/s/ JAMES S. WARD

Of Counsel

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

VICTOR UNDERWOOD and CARMEN EDWARDS, for themselves, et al	)	
Plaintiffs	)	
v	)	CA 78-M-0704
NELL HUNTER, et al	)	
Defendants	)	

MOTION TO AMEND ANSWER

Come now the Defendants in the above styled cause, by and through their attorney of record, and respectfully move this Court for an Order allowing Defendants to amend the answer previously filed by them to Plaintiffs' Fourth Cause of Action by adding the following affirmative defenses:

1. For that the Plaintiffs have failed to exhaust available and existing state or city administrative remedies which would restore to them the right to vote.

Respectfully submitted

Stuart & Ward

/s/ JAMES S. WARD

Special Assistant Attorney General
for Defendants
1933 Montgomery Highway
Birmingham, Alabama 35209
939-0276

CERTIFICATE OF SERVICE

I certify that I have served a copy of the above and foregoing Motion to Amend Answer upon the Honorable Edward Still, by hand delivering a copy of same to him in open Court on this the 21 day of July, 1981.

/s/ JAMES S. WARD

Of Counsel

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 19

No. 80-7084

D. C. Docket No. CA 78-M-704-S

VICTOR UNDERWOOD, and CARMEN EDWARDS,
for themselves and all others similarly situated,
Plaintiffs-Appellants,

versus

NELL HUNTER, JOSEPH J. TRUCKS, Individually
and as members of the Board of Registrars
of Jefferson County, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Alabama

Before KRAVITCH, HENDERSON and REAVLEY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be, and the same is hereby, affirmed;

IT IS FURTHER ORDERED that plaintiffs-appellants pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

JULY 15, 1980

ISSUED AS MANDATE: SEP 11 1980

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 80-7084

VICTOR UNDERWOOD, and CARMEN EDWARDS,
for themselves and all others similarly situated,
Plaintiffs-Appellants,

versus

NELL HUNTER, JOSEPH J. TRUCKS, individually
and as members of the Board of Registrars of
Jefferson County, Et Al.,
Defendants-Appellees.

Appeal from the United States District Court for
the Northern District of Alabama

(JULY 15, 1980)

Before KRAVITCH, HENDERSON and REAVLEY, Circuit Judges.

PER CURIAM:

Plaintiffs appeal the denial of their preliminary injunction attacking the constitutionality of the Alabama Constitution, Art. VIII, § 182 (1901), as it operates to disenfranchise them. We affirm.

Procedural History

The confusing route through which this case reached this court for the second time requires a brief digression. On June 21, 1978, plaintiffs filed a complaint seeking a declaratory judgment that § 182 is unconstitutional. Plaintiffs asserted four grounds for relief: (1) that the misdemeanors and minor felonies listed in § 182 as disenfranchising offenses unconstitutionally impinge upon the franchise because they deny the franchise without a compelling state interest in violation of the First, Fifth, and Fourteenth Amendments; (2) that the disenfranchising offenses deny plaintiffs the equal protection of the

laws because more serious offenses are not disabling; (3) that disenfranchisement for conviction of a "crime involving moral turpitude" is based on a definition that is unconstitutionally vague; and (4) that the list of offenses was specifically adopted with the intent to disenfranchise blacks and, in fact, abridges the right to vote on the basis of race. Defendants moved to dismiss the complaint for failure to state a claim upon which relief could be granted.

Plaintiffs also sought a preliminary injunction restoring them to the voting rolls which was premised on the first three causes of action, but not the fourth. On July 19, 1978 the court conducted a hearing on the preliminary injunction, but subsequently expanded it to include arguments on the motion to dismiss and was presented with evidence outside the pleadings. The court denied the preliminary injunction and granted the motion to dismiss on August 11, 1978 with respect to the first three causes of action, stating that "if the motion to dismiss is treated as motion for summary judgment under Rule 56, it is due to be granted with respect to the first three causes of action." This court reversed because the district court failed to comply with F.R.Civ.P. 56 by providing a 10-day notice period required when a motion to dismiss is treated as a motion for summary judgment. Underwood v. Hunter, 604 F.2d 307 (5th Cir. 1979).

The district court had also denied the fourth cause of action as failing to state a claim upon which relief could be granted. This court reversed, stating that plaintiffs' allegations, if supported by facts developed in a later proceeding, did state a claim. *Id.*

On remand, plaintiffs again moved for a preliminary injunction in the district court, which was denied in a memorandum opinion on February 14, 1980.[1] The present case is plaintiffs' appeal from that order.

[1]On April 18, 1980, the trial court again reviewed plaintiffs' first three causes of action, and again dismissed on the basis of its August 11, 1978 memorandum opinion. With respect to count four, the court granted plaintiffs' motion for class certification with regard to both plaintiff and defendant classes.

Merits

A preliminary injunction is an extraordinary remedy and its denial will be overturned only for an abuse of discretion. Compact Van Equipment Co. v. Leggett & Platt, Inc., 566 F.2d 952 (5th Cir. 1978). To be entitled to a preliminary injunction, a movant must establish each of four prerequisites: (1) a substantial likelihood of ultimately prevailing on the merits; (2) a showing of irreparable injury unless the injunction issues; (3) proof that the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) a showing that the injunction, if issued, would not be adverse to the public interest. *Id.*; Comerisch v. University of Texas, 616 F.2d 127, 130 (5th Cir. 1980).

Plaintiffs fail to meet the second element, a showing of irreparable harm. Although each had been disenfranchised for conviction of a crime involving moral turpitude, an individual in Alabama can have his right to vote restored if pardoned. ALA. CODE § 12-14-15, *see* § 17-3-5. Victor Underwood was purged from the voting list in Jefferson County on April 30, 1977 for conviction for issuing a worthless check 2½ to 3 years prior to the July 19, 1978 hearing on the initial preliminary injunction. Although officials of the Jefferson County Board of Registrars informed Underwood of the procedure for having his voting rights restored, he has made no effort to comply, nor has he alleged any difficulty in complying with this procedure. Carmen Edwards was purged from the voting list of Montgomery County pursuant to her conviction for the crime of issuing a worthless check in May 1978. Although she attempted to receive a pardon, for purposes of restoration of her voting rights, from the Mayor of Montgomery, she was told that she must wait at least a year. She has not sought a pardon since the waiting period has elapsed.

Neither plaintiff, then, has presented any evidence which indicates that a proper application for a pardon would not have been granted. Under these circumstances, we cannot find that

granting a motion for a preliminary injunction is either necessary or appropriate. By affirming the district court's denial of a preliminary injunction, we intimate no view as to the merits of plaintiffs' allegation attacking the constitutionality of § 182 of the Alabama Constitution.

AFFIRMED.

DR. J. MILLS THORNTON,

[49] having been first duly sworn, was examined and testified as follows:

Q. Dr. Thornton, what do you teach and where?

A. I teach the History of the South at the University of Michigan in Ann Arbor, Michigan.

Q. In addition to the resume which has been received as Defendant's Exhibit 16, have you conducted your own research into the history of the south around the period of time 1901?

[50] A. Yes, I have.

Q. And what has that research consisted of, please, sir?

A. Well, I have worked in the post-bellum period generally on a number of research projects, but in particular the Constitutional Convention of 1901. I did a thesis as an undergraduate centering on the origins of disfranchisement in Alabama.

Q. And that was your Ph.D.?

A. No, that was not, that was a B.A. thesis.

Q. B.A.?

A. Yes.

Q. Where was that?

A. At Princeton University.

Q. Based on your reading and your research and your education that you received, are you familiar with the period of time up to and including the Convention of 1901 in this State?

A. Yes, I am.

Q. And are you familiar with the Constitutional Convention of 1901?

A. Yes, I am.

Q. And I will ask you, Dr. Thornton, in your opinion, is it necessary in talking about the 1901 Convention to examine it and look at it as a whole as opposed to any pieces?

[51] A. Yes, absolutely.

Q. And is it necessary then, in order to determine what the intent of the drafters of Section 182 might have been, to examine the Convention as a whole and the suffrage article which was passed as a whole?

A. Yes.

MR. STILL: Objection, leading.

THE COURT: Overruled.

Q. (By Mr. Ward) Doctor, what, in your opinion, is the purpose or was the purpose of the Alabama Constitutional Convention of 1901?

A. The Alabama Constitutional Convention of 1901 was called to prevent a recrudescence of the Populist Revolt which had convulsed Alabama politics throughout the 1890's, throughout the period of 1890 and the Spanish American War. It was intended to limit the franchise in Alabama in such a way that it would be impossible for the rule of the Democratic Party, the hegemony of the Democratic Party in the State again to be effectively challenged.

Q. What are you saying then, Dr. Thornton, is there were political reasons for calling the Convention?

A. That is correct.

Q. And was the eventual passage of 182 part of this purpose or this scheme, this political scheme?

A. Yes, it was.

[52] Q. Doctor, what if anything did the Convention do in order to accomplish this purpose? What did they pass, if anything?

A. Well, there are two halves of the scheme, as you would call it. The first is the Suffrage Article, and the second is the article apportioning the State Legislature. But the Suffrage Article is the primary element in the effort to structure Alabama politics the way they wished.

Q. Could you explain to the Court, please, sir, what eventually passed as you were calling the Suffrage Article? If I understand, there is a permanent part and a temporary part. If you could explain that to the Court, please, sir.

A. All right. The Suffrage Article as it finally comes from the Convention has several parts to it. There is a set of requirements that are applicable from the beginning on all voters. Those include residency requirements, two years in the State and one year in the county and six months in the precinct, a poll tax and the crimes section, which is at issue here.

Then in addition to those requirements which take effect from the ratification and proclamation of the Constitution, there are two separate suffrage plans known as the temporary plan and the permanent plan. Under the temporary plan which was in effect until January 1st of 1903, that is for a year and one month because the Constitution was proclaimed in effect at the end of November [53] of 1901, so for the month of December of 1901 and then the calendar year 1902, the temporary plan is in effect. Under the temporary plan, all persons, all adult males who can meet the residency requirement and the crimes disfranchisement requirement may register, if they have served honorably in the armed forces, in the armed forces in any war — I started to say the armed forces of the United States, but it is not just the armed forces of the United States, because it includes the Confederate Army as well. So the armed forces in any of the wars of the United States, or if they are direct descendants of any person who did so, or if they are of good character and understand the obligation and duties of a citizen. That temporary plan goes out of effect on January 1st, 1903, and the permanent plan comes into operation. Under the permanent plan, any person may register who is an adult male meeting the other requirements, and who either can read and write the English language and has been employed for 12 months preceding the time he offers to register, or who owns 40 acres of land on which he resides, or owns an amount of either real estate or personal property assessed for taxes at $300 on which the taxes have been paid.

Q. Dr. Thornton, was the poll tax part of the suffrage plan that was passed?

A. The poll tax is a part of the suffrage plan that is enacted. On the other hand, the poll tax is not an element in registration. The poll tax is an element in voting.

* * * *

[54] Q. Did Section 182, which is the crime provision, apply to those people who were to be registered under the temporary plan?

A. Yes, it did, just as does residency.

Q. Any others?

A. It would be residency and crimes, and then that you be over the age of 21 and a male.

* * * *

[56] Q. Dr. Thornton, based on your study and your research and your reading, in your opinion, I will ask you whether [57] or not disfranchisement of poor whites was an important — as important intention and motive of the delegates to the Convention of 1901 as was the disfranchisement of blacks?

A. Absolutely. The two halves of the threat that Populism has posed during the 1890's are that poor whites have left the Democratic Party and thus have made general elections matter in the State politics, and that they are appealing to black voters and turning black voters into the balance of power. Consequently, the way to prevent a recrudescence of Populism must involve dealing with the threat on both levels. Both in eliminating the black vote that had — the courting of which had represented the principal threat from the point of view of conservative white democrats, and the elimination of poor white voters who had been the backbone of the Populist Party, the members of the Farmer's Alliance and the people who had bolted the Democratic Party in the first place.

Q. Would it be fair to say, in your opinion, that Section 182 was part of the plan to prevent and disfranchise the poor whites as well as any blacks?

A. Yes, that's right. The entire Suffrage Article has that aim in Section 182, as much as other sections.

Q. Doctor, can we then look at some things that you have brought in support of that opinion? Can you tell the Court who John Knox was, very briefly?

[58] A. John Knox was the President of the 1901 Convention, a lawyer from Anniston.

Q. Did he make any statement a few years after the Convention of 1901 concerning what the motives of the people there were?

A. Yes. In 1905, he wrote an article for *Outlook Magazine*. *Outlook* was a national magazine comparable to *Time* or *Newsweek* today, describing the motives of the delegates to the Convention of 1901.

* * * *

[59] Q. (By Mr. Ward) I will ask you, Dr. Thornton, in reading that article, what, if anything, John Knox said concerning the intention of the delegates of the 1901 Convention.

A. Well, he makes the point that whereas he concedes that the temporary plan has on its face the intention of enfranchising whites and not blacks, he makes the point that that is the only possible way that the Constitution could have been ratified. They had to get it past the voters. But he says the principal goal of the delegates was to place the Suffrage, as he says, on a high plane, and that they limited the time of the application of the temporary plan quite severely to one year, 13 months, and that as soon as the permanent plan went into effect, that it would apply across the board to the standard phrase from the Convention, from the delegates as to all the ignorant and the vicious.

Q. And that was referring to the whites?

[60] A. That refers to blacks and whites.

Q. In speaking of the efforts to extend the temporary plan, what, in your studies, does the leadership of the Democratic Convention — what was their intention along those lines, along the extension of the temporary plan beyond January 1, 1903?

A. Well, there are repeated — let me say this. There are essentially three points of view among the delegates about Suffrage, or three blocs. This is excluding Republican and Populist delegates who are opposed to disfranchisement of any kind. But among the democratic delegates, there are those who favor an immediate conversion to a plan which would disfranchise poor whites and blacks equally and confine the electorate at once to literate whites. This is a small minority among the delegates. Their amendment, in fact, when the test vote comes, their amendment is rejected 109 to 24, I believe is the vote.

Then there are delegates chiefly from rural North Alabama counties who are in favor of enfranchising all whites and disfranchising all blacks, and then there are the delegates who are actually the majority of the Democratic Party and who constitute the leadership of the Convention, who favor the disfranchisement of poor whites, but believe that they cannot get the Constitution ratified unless they have in something like the temporary plan, which [61] will leave white voters in the North Alabama counties to vote in favor of ratification. Now these, this group is defined as a majority of the Convention by a series of efforts on the part of this group that likes the temporary plan and doesn't like the permanent plan, because the permanent plan would disfranchise poor whites who want to extend the time of operation of the temporary plan. There are no less than three efforts made during the course of the Convention to extend the time of the temporary plan. First to January 1st, 1906, which is beaten back; then to January 1st, 1905, which is beaten back, and then to allow persons who might become 21 by January 1st, 1905 to register under the temporary plan before January 1st, 1903, even though they were not yet 21, but to begin voting when they did become 21. All three of those efforts are beaten back, and those roll call votes define who in the Convention is in favor of the temporary plan as an expedient to get the Constitution ratified and who are much more committed to black disfranchisement and the enfranchisement of all whites.

Q. Then I will ask you whether or not the efforts to defeat the extension of the temporary plan is a factor, in your opinion, that the delegates of the Convention were just as concerned about disfranchising poor whites as they were blacks?

A. Yes, that's correct.

* * * *

[62] Q. And if I may, to read you this and to state if that is your understanding according to McMillan, "In 1905 Francis G. Caffee, a lawyer who was practicing in Montgomery at the time of the Alabama Convention, wrote concerning its motives:

'It was generally wished by leaders in Alabama to disfranchise many unworthy white men, to rid the State eventually, so far as could possibly be done by law, of the corrupt and ignorant among its electorate, white as well as blacks. The poll tax and vagrancy clauses were put into the Constitution.'" Is that the reference and quotation to which you refer?

A. Yes.

* * * *

[63] Q. (By Mr. Ward) Dr. Thornton, I believe before you testified, did you not, that Section 182 of the Constitution, the crimes provision and the property qualifications and the poll tax, applied as well to those who registered under the temporary plan?

A. That's right, both temporary and permanent.

Q. I will ask you whether or not, in your opinion, that would be another factor in your statement that the intention of the framers and the people at the Convention of 1901 was to disfranchise poor whites as well as blacks?

A. Yes. In fact, in the debates at the Convention when there are allegations that all whites, including as they say, "vicious whites" will be permitted to register under the temporary plan, since it would be essentially impossible for any white man not to be able to register under the temporary plan, the principal reliance that the delegates in the majority on the Suffrage Committee who were defending the Suffrage Committee plan, the principal reliance that they have in defense of themselves is the crimes provision. They say, "No, it is not true that the really vicious whites will be permitted to register under the temporary plan because they will, if they had been convicted of crime, they will go out under Section 182."

* * * *

[68] Q. Was 182 discussed very much, Section 182?

A. No.

* * * *

[69] Q. The Constitution of 1875, Dr. Thornton, already provided that those who were convicted of a crime which resulted in imprisonment in the penitentiary would be disfranchised?
A. That's correct.
Q. And do you know of the crimes added to Section 182, if those, what the majority of those crimes were?
A. Well, the Crimes Article is another example of the way in which public relations is being used to convince the electorate, the white electorate that it is not voting to disfranchise itself but is voting for a constitution directed explicitly at blacks. Because as you say, the Constitution of 1875 already disfranchises anyone who is convicted of a crime for which you might be sentenced to the penitentiary. What the Constitution of 1901 does is repeats that same phrase, but before it gets to that phrase, [70] it goes through a long list of crimes for which you can be sentenced to the penitentiary. Now all of those are included in the general phrase, and you could simply have repeated the general phrase, but these crimes are put in precisely because they are associated in the public mind with the behavior of blacks. They are drawn by the Suffrage Committee from a report by a delegate from Dallas County who is named John Fielding Burns, who had drawn them up precisely because they were crimes which, in his practice as a Justice of the Peace, he had found to be — he had found blacks to be, as he thought, peculiarly subject to. But the Suffrage Committee takes them and puts them into the Article not with any real effect as it were, because the general clause incorporates them, but rather as a public relations gesture so that the white electorate, as they read this list, will have their mind focused on this as an anti-Negro measure.
Q. When in fact, if I understand you, the Constitution of 1875, in effect, already had provided the same thing?
A. That's correct.
Q. Doctor, have you researched between the time of the Constitution of 1901, which became effective —
A. Which was in December of 1901, that's right, end of November.

Q. — until the end of the temporary plan, which was [71] December 31st, 1902?

A. Correct.

Q. What percentage of whites were disfranchised with Section 182 and what percentage of blacks were disfranchised?

A. Well, give me two seconds and I can give you the figures on that.

On the census of 1900, there are 229,766 adult white males in the State, and 181,345 adult black males. We know the number of persons who were registered as a January 1st, 1903, which —

Q. By looking at the census figures and all the information, did you arrive at a percentage of whites and blacks disfranchised between December 1901 and December of 1902?

A. Well, it would appear that 178,365 blacks and 35,294 whites were disfranchised by the operation of the temporary plan.

Q. What percentage of those, then, white to black, were because of Section 182? I believe you told me some percentages before.

A. Yes. It would appear that possibly — these are extrapolating from figures as to those who have committed crimes taken from the biannual reports taken from the Board of Convict Inspectors. It would appear that about 3 percent of whites who were disfranchised because [72] of the operation of the crimes clause, and about seven and a half percent of blacks who were disfranchised were disfranchised because of the operation of the crimes clause.

* * * *

Q. (By Mr. Ward) Dr. Thornton, one or two last quick questions. In your opinion, I will ask you whether or not the poll tax, which was passed in the 1901 Convention, had the effect of disfranchising more whites than blacks?

A. Absolutely, because disfranchisement by the poll tax has to take place after you are registered. And since so few blacks were registered and since you have to be a registered voter be-

cause you can be disfranchised would have operated almost exclusively on the whites.

Q. And that was part of the scheme, to disfranchise poor whites as well as blacks?

A. That's right, it was so understood at the time. On this, I might say, as far as I know, there are no scholars who disagree.

• • • •

[73] Q. The aim of the 1901 Constitution Convention was to prevent the resurgence of Populism by disenfranchising practically all of the blacks and a large number of whites; is that not correct?

A. Yes, sir.

Q. The idea was to prevent blacks from becoming a swing vote and thereby powerful and useful to some group of whites such as Republicans?

A. Yes, sir, that's correct.

Q. The phrase that is quite often used in the Convention is to, on the one hand limit the franchise to intelligent and virtuous, and on the other hand to disenfranchise those that Francis Caffee refers to as "corrupt and ignorant," or sometimes referred to as the ignorant and vicious?

A. That's right.

Q. Was that not interpreted by the people at that Constitutional Convention to mean that they wanted to disenfranchise practically all of the blacks and disenfranchise those people who were lower class whites?

A. That's correct.

• • • •

[74] Q. Have you done any research into the relative conviction rates of blacks and whites for all crimes?

A. Yes, sir. As of September 1st, 1902, 87 percent of persons, males who were in State custody were black, and 13 percent were white. 94 percent of persons who were in county custody were black, and 6 percent were white.

Q. And the population of the State of Alabama was approximately 40 percent black at that time; is that correct?

A. Actually, 45. It was 55 percent white, 45 percent black.

Q. And about 45 percent of the male adult population was also black is that not correct?

A. Yes, sir, that is correct.

* * * *

[79] Q. And what we come out with is about a ten or eleven times as many blacks who were disenfranchised by the crimes provision as whites were; is that correct?

A. Well, that follows statistically from the evidentiary base. That is to say, the evidentiary base I am using, 1902, shows 80 something percent of blacks in State custody, prisoners in State custody, and 94 percent of blacks in county custody were prisoners in county custody were black, and consequently, since I am extrapolating from those figures, therefore the extrapolation is going to show the same relationships, necessarily. That would be about 90 percent.

Q. So all of the evidence that you have found shows that about ten times as many blacks were disenfranchised by the crimes provision as whites? We are talking about in raw numbers.

[80] A. Yes, sir, I do understand exactly what you are saying. And that is exactly correct, except that I worry slightly about the way in which you have phrased it. If you will permit me, within the perimeters of the prison population as it stands, the crimes clause, it appears to me, is operating essentially across the board of the prison population and it is drawing blacks and whites to disfranchisement in about the same percentage as the prison population at large. The crimes clause would disfranchise all of the persons in State custody and about two-thirds of the persons in county custody, and it draws from across the board. But within that limitation, if you accept that limitation, then the answer to your statement is yes.

Q. Near the end of the Convention, John Knox did make a speech to the Convention in which he summarized the work of the Convention, and in that speech is it not correct that he said that the provisions of the Suffrage Article would have a dispro-

portionate impact on blacks, but he disputed that that would be violation of the Fifteenth Amendment?

A. Yes, sir, that is true. Repeatedly through the debates, the delegates say that they are interested in disfranchising blacks and not interested in disfranchising whites. And in fact, they go out of their way to make that point, and it is so startling and offensive to modern [81] sensibilities, that we tend to be — that tends to overwhelm us. If you read the four volumes of the official proceedings — a fate I wouldn't wish on anyone — but if you happen to, you will come away with the sense that race simply dominates the proceedings of the Convention. But the point that I am trying to make is that this is really speaking to the galleries, that it is attempting to say to the white electorate that must ratify this constitution what it is necessary for that white electorate to be convinced of in order to get them to vote for it, and not merely echoing what a great many delegates say. Now, I would point out to you that there are occasions in the debates, particularly in the debate over the motions to extend the time of the temporary plan, that the desire to disfranchise poor whites pops out in the words of the majority of the Suffrage Committee. But in general, the delegates aggressively say that they are not interested in disfranchising any whites. I think falsely, but that's what they say.

Q. So they were simply trying to overplay the extent to which they wanted to disenfranchise blacks, but that they did desire to disenfranchise practically all of the blacks?

A. Oh, absolutely, certainly.

J. Morgan Kousser, PhD,

called as a witness, having been first duly sworn, was examined and testified as follows:

Examination

[3] By the reporter:

Q. Please state your full name.
A. By name is J. Morgan Kousser, k-o-u-s-s-e-r. My address is 1818 North Craig Avenue, Altadena, California.

Q. Please state your educational background beginning with college. Please include the subjects of your masters thesis and doctoral dissertation, if any.
A. I received an A.B. at Princeton University in 1965, a M. Phil, p-h-i-l, at Yale in 1968, and a P.h.D. from Yale in 1971 where I studied under Professor C. Vann Woodward, v-a-n-n.

The topic of my dissertation was, "The shaping of southern politics, suffrage restriction and the establishment of the one party south, 1880 to 1910."

• • • •

[5] Q. According to your research, was there much discussion at the 1901 Alabama Constitutional Convention regarding the desirability of the disenfranchising blacks?
A. The Alabama Constitutional Convention of 1901 was called for the prime purpose of disfranchising blacks. All scholars agree upon the subject. There was considerable discussion on and frank discussion of the subject by delegates to the convention as well as by newspapers, executive committees of the political parties and contemporaries in general in the period leading up to the Constitutional Convention.
Q. What was the tenor of the discussions?
A. The general tenor of the discussion was that virtually all Democrats wanted to eliminate virtually all blacks from the electorate and that white populace of Republicans as well as blacks, most of whom were Republican, wished to keep free and impartial suffrage for blacks.

Q. What was the specific source of the crime provision which was eventually adopted as Section 182 of the Constitution?

[6] A. Let me turn now to the question of the intentions of the framers of the Section 182 of the Alabama Constitution of 1901. There is very little direct evidence on the intention of all of the delegates who voted for Section 182, or even on the intentions of the Suffrage Committee of the Constitutional Convention. The committee did not keep any minutes or other records of internal debate, nor did any of its major figures leave paper collections relevant to this issue.

Newspapers carried a great deal of information and opinion on suffrage plans and strategies at the time of the 1901 convention, but no newspaper reporter seems to have had access to the committee debates.

There was almost no debate on the floor of the convention on Section 182. This might be taken to imply that the delegates did not think the section important. I believe that this would be a misinterpretation although I would not contend that the delegates thought the section as important as Sections 180 and 181.

The real reason that Sections 180 to 181 were subject to more debate is that they were more controversial, that the fighting grandfather clause was more clearly unconstitutional and unfair, and the poll tax and literacy and property tests were likely to disfranchise more whites than was Section 182.

A section such as 182, which was, as [7] everyone apparently knew, aimed chiefly at blacks and which seemed sufficiently neutral on its face to pass muster before the racist courts of the day was certain to be less controversial in this all-white convention, which was overwhelmingly committed to the disfranchisement of blacks.

Since direct evidence of the intentions of the delegates on this section is not available, we must rely on indirect and somewhat fragmentary evidence. Fortunately, all the indirect evidence points in the same direction.

The intentions of the delegates on Section 182 must be viewed in the context of the whole convention. There is no

question that the overriding issue in calling the convention was black disfranchisement. The proponents and delegates admitted this openly and repeatedly, and all scholars agree on this fact.

See, for example, Alabama Constitutional Convention Journal 1901, pages 1755, et seq, and pages 1776, et seq, and Kousser, *The Shaping of Southern Politics*, pages 165 to 171 and 250 to 251.

The fact that the delegates wanted and expected to disfranchise some whites as well, despite their guarantees to the contrary before, during and after the convention, does not undermine an equal protection challenge, even under the doctrines common in 1901, for they framed the suffrage restrictions to have a vastly disproportionate [8] effect on blacks.

Many of the delegates were lawyers, and they were familiar with the reigning, relevant case then; the Chinese laundryman case, Yick, y-i-c-k, Wo, w-o, versus Hopkins, 181 U.S. 356, 1886; and knew that barring a few whites would not be a constitutional saving grace.

In any event, their intention that the new suffrage regulations, as a whole, would have a disproportionate impact on blacks is very clear.

Another indirect piece of evidence of their intent is present on the face of the law in what crimes the conventioners defined as disfranchising, that they added to the 1875 Constitution's list, crimes which they thought blacks would be disproportionately likely to be convicted of, is especially apparent in their inclusion of sex-related crimes, living in adultery, assault and battery on the wife, rape and miscegenation.

Does anyone have to be reminded about the contemporary Southern fixation on black men raping white women, or the fact that whites were never convicted of miscegenation, and small property crimes, vagrancy and petty theft? Even if we had no better evidence than this of the intent of the framers, the manifestly disproportionate and racially discriminatory impact which the enforcement of this extended list would be expected to have would have been sufficient to indicate to me,

at least, that the [9] framers were aiming to disfranchise blacks by this section.

• • • •

[16] To sum up this point, the Alabama disfranchisers closely studied methods of disfranchisement elsewhere and in every state which had a petty crimes provision the intent was the same; to disfranchise blacks. Further, in their own state, they must have known that it was chiefly blacks who were convicted of such crimes, and thus could have understood the impact of the clause quite easily.

But, we have more direct evidence of the intent of the principal author of Section 182, John F. Burns, b-u-r-n-s; in his original draft Burns included:

[17] ". . . all those who are bastards or loafers or who may be infected with any loathsome or contagious disease."

It was, of course, common at the time for whites to think that these traits were predominant among blacks.

Burns also believed, in the summary of a recent scholar:

> "The crime of wife beating alone would disqualify 60 percent of the Negroes."

The quotation is from Jimmie, j-i-m-m-i-e, Frank Gross, g-r-o-s-s, *Alabama Politics and the Politics and the Negro, 1874 to 1901*, unpublished P.h.D. dissertation, University of Georgia, 1969, page 244.

Similarly, see McMillan, *Constitutional Development in Alabama*, page 275, footnote 76.

Burns says:

> "Actions again demonstrate the connection between past impact and present intention."

For as a long-time justice of the peace in Black-Belt Burnsville, Burns knew very well what crimes black people were likely to be convicted of, and therefore was easily able to tailor Section 182 to cover crimes which [18] would have the maxi-

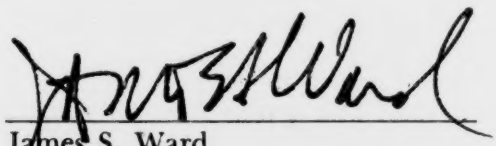
mum racially discriminatory impact. His position as chief framer of the section lends special importance to his clear and obvious intent.

* * * *

[24] Let me summarize my argument as a whole. Most of the evidence as to the intentions of the framers of Section 182 is indirect, but all of it points in the same direction. The section was designed to have a racially discriminatory disproportionate impact on blacks, drafted by ingenious lawyers who were trying to circumvent the Fourteenth and Fifteenth Amendments while seeming not to violate their letter. Section 182 may be defended by similarly clever but obviously flawed arguments.

Looking at all the evidence, it is my view as a historian that the intention of the framers was clear.

Submitted by



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CERTIFICATE OF SERVICE

I, James S. Ward, a member of the Bar of the Supreme Court of the United States and counsel of record of Nell Hunter, et al, individually and on behalf of all other members of Board of Registrars in the State of Alabama, appellants herein, hereby certify that on November 21, 1984, pursuant to Rule 33, Rules of the Supreme Court, I served three copies of the foregoing Joint Appendix on each of the parties herein as follows:

On Victor Underwood and Carmen Edwards, for themselves and all others similarly situated, appellees herein, by depositing such copies in the United States Post Office, Birmingham, Alabama, with first class postage prepaid, properly addressed to the post office address of Edward Still and Neil Bradley, the above named appellees counsel of record, at Edward Still, Suite 400, Commerce Center, 2027 First Avenue North, Birmingham, Alabama 35203 and Neil Bradley, ACLU Foundation, 52 Fairlie Street NW, Atlanta, Georgia 30303.

On the Solicitor General, Department of Justice, by depositing such copies in the United States Post Office, Birmingham, Alabama, with first class postage prepaid, properly addressed to the post office address of The Solicitor General, Department of Justice, Washington, D.C. 20530.

On William Bradford Reynolds, Assistant Attorney General, Charles J. Cooper, Deputy Assistant Attorney General, and Brian K. Landsberg, Esquire, by depositing such copies in the United States Post Office, Birmingham, Alabama with first class postage prepaid, properly addressed to the post office address of William Bradford Reynolds, Assistant Attorney General, Charles J. Cooper, Deputy Assistant Attorney General and Brian K. Landsberg, Esquire, United States Department of Justice, Washington, D.C. 20530.

All parties required to be served have been served.

Dated: November 21, 1984

James S. Ward
Special Assistant Attorney General
Attorney for Appellants

AFFIDAVIT OF SERVICE

STATE OF ALABAMA)

JEFFERSON COUNTY)

I, James S. Ward depose and say that I am an attorney in the law firm of Corley, Moncus, Bynum & DeBuys, and I am the attorney of record for Nell Hunter, et al, individually and on behalf of all other members of Board of Registrars in the State of Alabama, the appellants herein, and that on the 21st day of November, 1984, pursuant to Rule 33, Rules of the Supreme Court, I served three copies of the foregoing Joint Appendix on each of the parties required to be served therein, as follows:

On Victor Underwood and Carmen Edwards, for themselves and all others similarly situated, appellees herein, by depositing such copies in the United States Post Office, Birmingham, Alabama, with first class postage prepaid, properly addressed to the post office address of Edward Still and Neil Bradley, the above named appellees counsel of record, at Edward Still, Suite 400, Commerce Center, 2027 First Avenue North, Birmingham, Alabama 35203 and Neil Bradley, ACLU Foundation, 52 Fairlie Street NW, Atlanta, Georgia 30303.

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All parties required to be served have been served.

James S. Ward
Special Assistant Attorney General
Attorney for Appellants

Sworn to and subscribed before
me this the 21st day of November, 1984.

Notary

Office-Supreme Court, U.S.
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CLERK

No. 84-76 (4)

IN THE

Supreme Court Of The United States

October Term, 1984

NELL HUNTER, et al, individually, and on behalf of all other members of Board of Registrars in the State of Alabama,
Appellants,

vs.

VICTOR UNDERWOOD and CARMEN EDWARDS, for themselves and all others similarly situated,
Appellees.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR APPELLANTS

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QUESTIONS PRESENTED

I. Whether the Court below erred in holding that section 182 of the Alabama Constitution of 1901 violated on account of race the Fourteenth Amendment with respect to those convicted of crimes not punishable by imprisonment in the penitentiary.

II. Whether the Court below erred in failing to recognize the jurisdiction and authority conferred upon the State of Alabama by the Tenth Amendment to the United States Constitution to administer its electoral process, including the conditions under which the right of suffrage may be exercised.

III. Whether the Court below erred in failing to recognize the authority and jurisdiction conferred upon the State of Alabama to disfranchise those convicted of crimes involving moral turpitude pursuant to the "affirmative sanction" language in section 2 of the Fourteenth Amendment to the United States Constitution.

IV. Whether the Court below erred in failing to recognize that the State of Alabama has an interest in disfranchising persons who are convicted of crimes involving moral turpitude, regardless of whether or not the crime is a felony or a misdemeanor and regardless of whether or not the crime is punishable by imprisonment in the penitentiary.

V. Whether the Court below erred in failing to find that section 182 of the Constitution of Alabama of 1901 was not adopted with the intent, and has not had the affect, of disfranchising proportionally more blacks than whites or in the alternative that the Appellants demonstrated the existence of a permissible motive which led to the same result, that is the enactment of section 182 of the Constitution of Alabama of 1901.

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No. 84-76

IN THE

Supreme Court Of The United States

October Term, 1984

NELL HUNTER, et al, individually, and on behalf of all other members of Board of Registrars in the State of Alabama,

Appellants,

vs.

VICTOR UNDERWOOD and CARMEN EDWARDS, for themselves and all others similarly situated,

Appellees.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR APPELLANTS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit upon which this appeal is based appears in 730 F. 2d 614 (11th Cir. 1984) and is included in the Appendix to the Appellants' Jurisdictional Statement, at pp. A-1 to A-14.

The opinions of the United States Court of Appeals for the Fifth Circuit involving prior appeals and dispositions in this case appear in 604 F. 2d 367 (5th Cir. 1979) and 622 F. 2d 1042 (5th Cir. 1980) and are included respectively in the Appendix to the Appellants' Jurisdictional Statement, at pp. B-1 to B-4 and in Joint Appendix filed herein, at pp. A-11 to A-15.

The opinions from which the Appellees eventually appealed to the United States Court of Appeals for the Eleventh Circuit are included in the Appendix to the Appellants' Jurisdictional Statement respectively, at pp. D-1 to D-13 and E-1 to E-7.

GROUNDS OF JURISDICTION OF SUPREME COURT

This appeal arises from an action seeking to have declared unconstitutional on various grounds section 182 of the Alabama Constitution of 1901. The Appellees succeeded in reversing the District Court and prevailing in the United States Court of Appeals for the Eleventh Circuit which held that section 182 of the Alabama Constitution of 1901 violates on account of race the Fourteenth Amendment to the United States Constitution with respect to those convicted of crimes not punishable by imprisonment in the penitentiary. The final judgment of the United States Court of Appeals for the Eleventh Circuit was entered on April 10, 1984. A timely notice of appeal was filed on July 2, 1984 in the United States Court of Appeals for the Eleventh Circuit. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. 1254 (2) in that a state constitutional provision was invalidated as repugnant to the United States Constitution, specifically the Fourteenth Amendment thereof.

Cases that sustain the jurisdiction of this Court include:

Detroit v. Murray Corp., 355 US 489 (1958)
Chicago v. Atchison, T. & S.F.R. Co., 357 US 77 (1958)
United Gas Pipeline Co. v. Ideal Cement Co., 369 US 134 (1962)
Dusch v. Davis, 387 US 112 (1967)
Bradford Electric Light Co. v. Clapper, 284 US 221 (1931)

CONSTITUTIONAL PROVISIONS INVOLVED

1. Sections 1 and 2 of the Fourteenth Amendment to the United States Constitution:

SECTION 1

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction equal protection of the laws."

SECTION 2

"Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for president and vice-president of the United States, representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state."

2. The Tenth Amendment to the United States Constitution:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

3. Section 182 of the Alabama Constitution of 1901:

"The following persons shall be disqualified both from registering, and from voting, namely:

All idiots and insane persons; those who shall by reason of conviction of crime be disqualified from voting at the time of the ratification of this Constitution; those who shall be con-

victed of treason, murder, arson, embezzlement, malfeasance in office, larceny, receiving stolen property, obtaining property or money under false pretenses, perjury, subordination of perjury, robbery, assault with intent to rob, burglary, forgery, bribery, assault and battery on the wife, bigamy, living in adultery, sodomy, incest, rape, miscegenation, crime against nature, or any crime punishable by imprisonment in the penitentiary, or of any infamous crime or crime involving moral turpitude; also, any person who shall be convicted as a vagrant or tramp, or of selling or offering to sell his vote or the vote of another, or of buying or offering to buy the vote of another, or of making or offering to make a false return in any election of any person to any office, or of suborning any witness or registrar to secure the registration of any person as an elector."

STATEMENT OF THE CASE

This case was initiated when the appellees filed a complaint seeking to have declared unconstitutional section 182 of the Alabama Constitution of 1901 insofar as it applied to offenses carrying a penalty of one year or less, that is crimes not punishable by imprisonment in the penitentiary, and to enjoin its further application and for a preliminary injunction to have them, and the class they represented, restored to the voting lists in their respective county or to be allowed to register to vote in their respective county. (J.A. 1) In response, the appellants filed a Motion to Dismiss which raised, among other things, the following:

a. That the State of Alabama had an interest in disfranchising individuals who are convicted of crimes involving moral turpitude pursuant to section 182 of the Alabama Constitution of 1901, regardless of the length, kind or place of confinement, that not being the standard or condition which gave rise to this State interest.

b. That the State of Alabama had a compelling state interest or in the alternative a rational basis for disfranchising those

persons convicted of crimes involving moral turpitude, regardless of the length of sentence.

c. That section 2 of the Fourteenth Amendment to the United States Constitution either expressly allowed or exempted from the operation of section 1 of that Amendment provisions of state law such as section 182 of the Constitution of Alabama of 1901 and conferred upon the State of Alabama the authority to disfranchise moral turpitude misdemeanants. (R. 6)

In later motions and pleadings, the appellants additionally asserted as defenses the right under the Tenth Amendment to the United States Constitution to determine the conditions under which the right of suffrage may be exercised and the right to constitutionally exclude from the franchise those persons convicted of crimes involving moral turpitude.

The District Court, after an evidentiary hearing, overruled appellees' request for injunctive relief and granted the appellants' Motion to Dismiss (R. 24-32, 33-34 and J.S. pp. D-4 to D-14). On appeal, this decision was reversed on a procedural ground not in any way connected with the merits. *Underwood v. Hunter*, 604 F. 2d 367 (5th Cir. 1979) (J.S. pp. B-1 to B-4).[1]

Thereafter, appellees again filed a Motion for Preliminary Injunction in the District Court seeking similar relief to that originally requested. While pending, the appellees filed a Notice of Interlocutory Appeal with the Fifth Circuit and a Motion for Injunction Pending Appeal, again in an effort to gain the opportunity to vote in some upcoming elections. The Motion for Preliminary Injunction was denied by the District Court, the Motion for Injunction Pending Appeal was denied by the Fifth Circuit (R. 49-51 and 58-59) and the appeal was decided adversely to the Appellees as the Fifth Circuit opined that the District Court properly denied the latest attempt for injunctive relief because Appellees failed to demonstrate that any irreparable harm would result if the injunction was not

[1]References to the Jurisdictional Statement filed on behalf of the Appellants in this cause will be cited in the manner above.

granted. *Underwood v. Hunter,* 622 F. 2d 1042 (5th Cir. 1980). (J.A. pp. A-11-15).[2]

Language espoused in dealing with the issues involved is found in the second opinion in *Hunter,* supra, and is as follows:

"Plaintiffs (appellees herein) failed to meet the second element, a showing of irreparable harm. Although each had been disfranchised for conviction of a crime involving moral turpitude, an individual in Alabama can have his right to vote restored if pardoned. ALA. CODE Section 12-15-15, *see* Section 17-3-5. Victor Underwood was purged from the voting list of Jefferson County on April 30, 1977 for conviction of issuing a worthless check and two and one-half to three years prior to the July 19, 1978 hearing on the initial preliminary injunction. Although officials of the Jefferson County Board of Registrars informed Underwood of the procedure for having his voting rights restored, he has made no effort to comply, nor has he alleged any difficulty in complying with this procedure. Carmen Edwards was purged from the voting list of Montgomery County pursuant to her conviction for the crime of issuing a worthless check in May 1978. Although she attempted to receive a pardon, for purposes of restoration of her voting rights, from the Mayor of Montgomery, she was told that she must wait at least a year. She has not sought a pardon since the waiting period has elapsed.

Neither plaintiff, then, has presented any evidence which indicates that a proper application for a pardon would not have been granted. Under these circumstances, we cannot find that granting a Motion for Preliminary Injunction is either necessary or appropriate. . . ."

Subsequently, appellants Motion for Summary Judgment on Appellees' first three causes of action was granted. (R. 65-66 and J.S. pp. D-1 - D-3). After a hearing on the remaining cause of action, specifically the appellees' fourth cause of action which alleged that section 182 of the Alabama Constitution of 1901 was enacted with intent to deprive blacks the right to

[2]This opinion contains an excellent recital of the procedural history of this case through that appeal.

vote, the District Court denied appellees any relief and found in favor of the appellants. (R. 174 and J.S. pp. E-1 - E-7). However, this decision was reversed as reflected in the decision of *Underwood v. Hunter,* 730 F. 2d 614 (11th Cir. 1984) (J.S. pp. A-1 to A-14).

Appellees first three causes of action can be summarized as follows: That the misdemeanors listed in section 182 as disfranchising offenses unconstitutionally infringe upon the franchise because they deny the franchise without a compelling state interest, that the misdemeanors listed in section 182 as disfranchising offenses denied appellees equal protection of the laws because more serious offenses are not disabling and that disfranchisement for conviction of a "crime involving moral turpitude" is based on a definition that is vague and indefinite and denies plaintiffs the right to register and to vote. As stated, the appellants' Motion for Summary Judgment as to these three causes of action was granted and although made a basis of the appellees' appeal to the Eleventh Circuit, these causes of action were not discussed by the Court below as it reached its decision on the basis of the appellees fourth cause of action. The fourth cause of action alleged that the list contained in section 182 was specifically adopted because of its supposed disproportionate impact on blacks with the intent to disfranchise blacks, thereby abridging the right to vote on the basis of race.

Two hearings were conducted in this case. The first was held in July of 1978 and the testimony adduced at that hearing related mainly to the first three causes of action. The evidence at that hearing revealed the following:

Various lists prepared either by the local District Attorney or the State Attorney General were used by the appellants in determining whether a certain crime had been found to involve moral turpitude as well as lists prepared by these offices outlining which crimes disqualified one from voting pursuant to section 182 of the Alabama Constitution of 1901. (R. - 1978 - 27, 28, 33, 34 and 36).[3] Testimony revealed specifically that

the appellants had the use of an Attorney General of Alabama's opinion which specifically opined that the crime of issuing worthless checks was one involving moral turpitude and therefore disqualifying under section 182 of the Alabama Constitution of 1901, that crime being the one for which the named appellees were convicted. (R. - 1978 - 34, 37-38, 57-58). Further testimony revealed that if a crime was not in any of these lists, the local District Attorney's office or the Attorney General's office would be consulted to determine whether the crime was disqualifying. (R. - 1978 - 29, 36, 58-59, 62-63).

In this connection, we would point out that Exhibits introduced at the 1981 hearing established beyond doubt that the Appellants administered section 182 in an impartial manner and without regard to race. Significantly, the Eleventh Circuit in its opinion below recognized the Appellants' good faith in administering this section without reference to race. (J.S. p. A-13).

Appellee Underwood, who is white, was purged from the voting list in Jefferson County, Alabama because of his conviction of the crime of issuing a worthless check. He had been convicted of this crime some two and one-half to three years prior to July of 1978 and had been purged from the voting list in May of 1977. (R. - 1978 - 28, 49). To this date, he has not sought his statutory right and remedy of a pardon which would restore to him the right to vote, although he was aware of the same since May of 1977. (R. - 1978 - 51 and J.A. p. A-14).

Concerning the named appellee Carmen Edwards, she had been convicted in the Montgomery City Court of the crime of issuing a worthless check in May of 1978. (R. - 1978 - 39). Her

[3]Because one hearing made the subject of this appeal occurred in July of 1978, that is the hearing on the Appellees' initial request for a preliminary injunction, and the other occurred in July of 1981, that is on the merits of the Appellees' fourth cause of action, record references to the 1978 hearing will be preceded by designation of the year 1978 and references to the record of the 1981 hearing will be preceded by the designation of the year 1981.

testimony revealed that she was notified that she would have to wait one year before she could apply to obtain a pardon and therefore the right to vote. (R. - 1978 - 41-43). As in the case of Underwood, she has refused to utilize this simple procedure. (J.A. p. A-14).

The second hearing in this case involved the previously explained fourth cause of action. The crux of this hearing involved testimony by expert witnesses from both sides, the appellants' expert being J. Mills Thornton, III, a professor of Southern History at the University of Michigan. (J.A. p. A-16). It was the contention of the State of Alabama at this hearing, as buttressed and amplified by the testimony of Thornton, that section 182 of the Alabama Constitution of 1901 was passed for political reasons, that it was passed with the intent to disfranchise whites as well as blacks, a brief summary of this testimony being as follows.

According to Dr. Thornton, the purpose of the Alabama Constitutional Convention of 1901 in adopting section 182, was *political*, i.e., to repel the populist revolt and to make it impossible for the Democratic party in Alabama to be again challenged. (J.A. p. A-17). In Thornton's opinion, the passage of section 182 was part and parcel and in furtherance of this avowed *political* purpose of the convention. (J.A. p. A-17). Since the populists were made up of predominantly poor whites, and the Democratic party predominantly of rich and conservative whites, the blacks became the block of votes that would decide which party's candidates got elected. (J.A. p. A-19). Therefore, according to Thornton, the following was abundantly clear:

That the disfranchisement of poor whites was an equally important intention and motive of the delegates to the Constitutional Convention of 1901 and the drafters of the Constitutional provisions resulting from the convention as was the disfranchisement of blacks.[4] Section 182 of the Constitution of

[4]In the decision of the Court below, it is held that the appellants did not advance the denial of the franchise to poor whites as a permissible purpose under the second prong of the test announced in *Village of*

Alabama of 1901 was part of the plan, purpose and intention of the delegates to the convention, according to Thornton, to prevent and disfranchise poor whites as well as blacks, for political reasons. (Emphasis supplied) (J.A. p. A-19).

In support for this opinion, Thornton cited various pieces of documentary evidence, articles or written materials published shortly after the Convention, the inner play and applicability of other sections passed by the Constitutional Convention which demonstrated that section 182 applied with equal force and effect and with the purpose to disfranchise poor whites as well as blacks, e.g. section 178, 180 and 194 of the Constitution of Alabama of 1901, sections 178 and 194 being poll tax provisions, which had the effect of disfranchising more whites than blacks, and finally the fact that section 182 was hardly debated or mentioned at all at the convention, a fact recognized and agreed to by the Court below. (J.A. pp. A-19 - A-25). The scant reference to section 182 at the Convention, according to Thornton, was because Alabama's prior constitution, that being the Constitution of 1875, already had a provision that provided for the disfranchisement of any one convicted of a crime which resulted in imprisonment in the penitentiary. (J.A. p. A-23). Section 182 of the Alabama Constitution of 1901 repeated this phrase and then added a long list of crimes. However, each crime listed carried a punishment upon conviction of imprisonment in the penitentiary. Therefore, this listing was unnecessary because these crimes were all included in the general phrase of disfranchisement for conviction of crimes resulting in imprisonment in the penitentiary. (J.A. p. A-23). However, according to Thornton, they were added because the white public associated these crimes with blacks and the behavior of blacks to commit such crimes. This, according to Thornton, was an obvious factor that sec-

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Arlington Heights v. Metropolitan Developing Corp., 429 US 252 (1977). However, it is more than obvious from the above testimony of Thornton that the appellants did introduce evidence in support of their theory that the denial of the vote to poor whites was a permissible motive for the enactment of section 182.

tion 182 was not passed for the sole purpose of disfranchising blacks because, as explained, the Constitution of 1875, although phrased differently, already provided for disfranchisement for the conviction of the same type crimes. (J.A. p. A-23).

Finally, Dr. Thornton testified and emphasized that in reading the proceedings of the Constitutional Convention of 1901 a person should not be misled. The theme of the speeches and debates is to disfranchise blacks and not to disfranchise any whites. However, Thornton cautions that this is misleading and false and was intended only as a public relations ploy in order to convince the white electorate that they should vote for the articles adopted by the Convention because, in reality, after the expiration of the temporary plan, contained in section 180, which would only last 13 months, the entire suffrage article *had the intention to disenfranchise poor whites equally as well as blacks.* (J.A. p. A-27).

The importance of Thornton's testimony on this appeal is two-fold. First of all, it demonstrates that section 182 was not passed with the intention to disfranchise blacks or concomitantly, even if one were to conclude that it was, that there was another and permissible motive, the disfranchisement of poor whites as well.

Before closing it is imperative to note the following. All the crimes listed in section 182 which are not punishable by imprisonment in the penitentiary, and which are still viable, involve moral turpitude. (J.S. p. D-8). Therefore, one can only be disfranchised in Alabama if he is convicted of a felony or a non-felony involving moral turpitude, a non-felony being a crime not punishable by imprisonment in the penitentiary. The issue then becomes whether the state can disfranchise persons convicted of moral turpitude crimes, those being the still viable crimes added by the drafters of section 182.

SUMMARY OF ARGUMENT

Section 182 of the Constitution of Alabama of 1901 was not adopted with the intent, and has not had the effect of, disfran-

chising proportionally more blacks than whites. While there was little or no debate at the Constitutional Convention of 1901 concerning this section and little or no evidence concerning its passage, it is clear that its purpose was political, that it was passed with the intention to repel the populist revolt occurring at the time and to end any future threat to the Democratic Party. This political purpose was achieved by enacting provisions, including section 182, which had the equal and concomitant intention of disfranchising poor whites as well as blacks, while some provisions, specifically the poll tax provisions, having the effect of disfranchising many more whites than blacks. Consequently, the alleged racial intention in passing the provision in question was at least equal to the intention of disfranchising poor whites as well and therefore, the Appellees failed to meet their required burden of proof. Unfortunately, the Court below completely ignored and failed to even consider or discuss any testimony from the Appellants' expert which supported this logical and historically accurate position.

In any event, the Appellants demonstrated the existence of a permissible reason or motive for the passage of section 182, that is this section would have been passed anyway either because its purpose was to disfranchise poor whites as well as blacks, because the State has a right to disfranchise those who commit crimes involving moral turpitude or because the State has the right to enact such provision pursuant to the Tenth Amendment or the Fourteenth Amendment to the United States Constitution. Simply stated, this provision would have been passed and the same result achieved regardless of any allegations concerning illicit motive or protected conduct.

The Appellants submit that the State of Alabama has every right to exclude from voting those who have been convicted of crimes involving moral turpitude, without regard to the length or term of punishment, because of the "affirmative sanction" provision found in section 2 of the Fourteenth Amendment to the Constitution of the United States, as applied and explained in *Richardson v. Ramirez*, 418 US 24 (1974), because they have an interest in purifying the ballot box, to prevent against

violation of election laws and to exclude those from the franchise who have a greater tendency to violate the State's criminal laws, particularly where crimes involving moral turpitude are concerned, *Kronlund v. Honstein,* 327 F. Supp. 71 (N.D. Ga. 1971) and *Washington v. State,* 75 Ala. 582, 585 (1884) or because of the power expressly reserved to the States to set terms and conditions for the qualification of voters at its elections, including the condition of previous criminal record, as recognized in such cases as *Pope v. Williams,* 93 US 622 (1904) and *Lassiter v. Northhampton Board of Elections,* 360 US 45 (1959).

It is clear that a state has a right to disfranchise those who commit crimes involving moral turpitude. It is incongruous and lacking in logic to state on one hand that the State has this right but to ignore this right when one alleges that the vehicle for such disfranchisement was passed based upon an alleged impermissible motive. To carry the rationale and holding of the Court below to its fullest extreme, a provision of law would have to be stricken down which deprived the right to vote to murderers, those persons convicted of election offenses or those who violated the public trust, if it could be shown that a motive in passing such a regulation was an impermissible one. This cannot and must not be the law.

ARGUMENT

I. Rule 52(a) of the Federal Rules of Civil Procedure.

A mistake has been committed. The mistake, however, was not committed by the District Court but by the Court below when it concluded that the District Court's finding of lack of discriminatory intent in the adoption of section 182 was clearly erroneous. (J.A. p. A-6).

There is little room for argument that the clearly erroneous doctrine embodied in Rule 52(a) means that the lower court's finding of fact shall stand unless the reviewing court is left with a definite and firm impression that a mistake has been made. *American National Bank v. Federal Deposit Insurance*

Corp., 710 F. 2d 1528, 1533-34 (11th Cir. 1983). Furthermore, it is clear that this standard of review applies to findings of both subsidiary and ultimate fact, the ultimate factual question in this case being whether or not section 182 was passed with a discriminatory intent. *Pullman-Standard v. Swint*, 456 US 273 (1982). It is also quite clear that the only way the Court below could conclude that the District Court erred in finding that section 182 was not passed with discriminatory intent was to completely and totally ignore the testimony of the appellants' expert, Dr. Thornton. As a matter of fact, a review of the opinion below reveals that reference was made only to the testimony of the appellees' expert without any consideration to the testimony of Dr. Thornton or to the secondary pieces of evidence offered and explained by him. A consideration of his testimony and its support leaves firm the conclusion that the District Court was correct in its finding that section 182 was not passed with a discriminatory intent.

Because the opinion below is highlighted by its failure to consider or even cite the well reasoned testimony of Dr. Thornton and because his testimony is important not only to the present issue but those to follow, it is set forth now in some detail.

As previously eluded to, Dr. Thornton explained that the purpose of the Alabama Constitutional Convention 1901 and adopting section 182 was *political*, that is to repel the populist revolt and to make it impossible for the Democratic party in Alabama to again be challenged. According to Thornton, the passage of this section was part and parcel and in furtherance of this avowed *political* purpose of the Convention. Since the populists were made up of predominantly poor whites and the Democratic party predominantly rich and conservative whites, the blacks became the block of votes that would decide which party's candidates got elected. (J.A. p. A-19). As a result, it was abundantly clear that the disfranchisement of poor whites was an equally important intention and motive of the delegates of the Constitutional Convention of 1901 and the drafters of the Constitutional provisions resulting from the Convention as

well as the disfranchisement of blacks. Section 182 was part of this intention and of the plan and purpose of the delegates to prevent and disfranchise poor whites as well as blacks. (J.A. p. A-19).

In support of this opinion, Thornton cited among other things, the following, all of which failed to appear in any form or fashion or be discussed in any manner by the Court below:

1. According to Thornton, John K. Knox, the President of the Convention, wrote a magazine article in 1905, which, in essence, stated that the purpose of the Convention was to eliminate from the electorate all of the ignorant and the vicious referring equally to both blacks and whites, that being the reason why the temporary plan, or as referred to in the District Court's opinion as the fighting grandfather clause, was limited to only 13 months. (J.A. p. A-20, J.S. p. E-4).

2. According to Dr. Thornton, there were three separate votes at the Convention which defeated proposals to extend the temporary plan, which was codified in section 180 of the Constitution of Alabama of 1901. Since the temporary plan would allow more whites to register to vote, the defeat of these proposals extending the plan is evidence that the delegates to the Convention were equally concerned about disfranchising whites as they were blacks, therefore eliminating the populists, this obviously being done for political reasons. (J.A. p. A-21).

It is important to note that the District Court perceived the significance of this testimony. This is manifested by the following reference in its opinion:

". . . In committee, a provision known as the 'fighting grandfather clause' was developed. . . . Alabama's version, in section 780 (sic.) of the Constitution, allowed the franchise to those descended from veterans of the Revolutionary War, the War of 1812, the war with Mexico, the Civil War for the Confederacy and the Spanish-American War. The bulk of the dedate was on this clause. That portion of the debate concerning the section disfranchising (sic.) for crimes only treated the inclusion of violations of the vagrancy statute.

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. . . However, one point is clearly made. The State has a valid interest in denying the franchise to those convicted of violating its laws . . . The legislative history especially keyed the suffrage provisions to this interest. The expressions of concern around constitutionality by those at the convention who doubted the constitutionality of the suffrage provisions lay elsewhere — on the fighting grandfather clause. There is simply nothing in the legislative history to lead one to decide that the provisions disenfranchising those convicted of crimes are based upon the racism present at the Constitutional Convention." (Citations omitted). (J.S. p. E-4 - E-5).

3. The fact that section 182 was hardly discussed at the Convention. (J.A. p. A-22). Undoubtedly then, the main concern of the Convention as related to suffrage provisions was the fighting grandfather clause found in section 180 of the Constitution, a provision to which section 182 applied.

4. An article written by Frances Caffey in 1905, Caffey being a lawyer practicing in Montgomery at the time of the Convention, wherein he stated that it was generally wished by leaders in Alabama to disfranchise many unworthy white men and to rid the State of the corrupt and ignorant among its electorate, white as well as blacks, again to stem the populist tide. (J.A. pp. A-21-22).

5. The property qualifications, section 181 of the Constitution of Alabama of 1901, the poll tax provisions, sections 178 and 194 of the Constitution of Alabama of 1901 and the crimes provision, section 182 of the Constitution of Alabama of 1901, applied to all persons who were eligible for registration under the temporary plan, that being section 180 of the Constitution. According to Thornton, this is an important factor that the intention Convention was to disfranchise poor whites equally as well as blacks. (R. 1981 - 64-66).

This opinion of Thornton is supported not only historically but logically. Appellees argue that section 181 was enacted to accomplish disfranchisement of blacks because it added re-

quirements of literacy and ownership of property, two requirements which were not included in section 180. But it is the apparent disparity of these two provisions which demonstrates that section 182, itself, was not passed with a discriminatory intent. This is so because both section 180 and 181 of the Alabama Constitution of 1901 set out the individuals who desire to register must not be disqualified under section 182. Consequently, if section 182 was passed solely to disfranchise blacks, then it would certainly seem that those registering under section 180 would not be subjected to the disqualifications under section 182 the same as those individuals registering under section 181, a provision appellees certainly claim was enacted only to disfranchise blacks.

6. The fact that the permanent registration plan, section 181 of the Alabama Constitution of 1901, and as discussed by Dr. Thornton at J.A. pp. A-17-18, would go into effect 13 months after the Constitutional Convention of 1901 and would apply equally to whites and blacks and have the effect of disfranchising from the electorate vicious whites as well as blacks. (R. - 1981 - 67-68).

7. As noted, section 182 was hardly discussed at the Convention. Thornton opines the reason for this is because the Alabama Constitution of 1875 already had a provision which provided for the disfranchisement of anyone convicted of a crime which resulted in imprisonment in the penitentiary. Section 182 repeated this phrase and then added a long list of crimes. However, each crime listed, with rare exception, carried a punishment upon conviction of imprisonment in the penitentiary. Therefore, this listing was unnecessary because these crimes were all included in the general phrase of disfranchisement for conviction of crimes resulting in imprisonment in the penitentiary. Consequently, this is an obvious factor in concluding that 182 was not passed for the sole purpose of disfranchising blacks. This fact, according to Thornton, is in line with the unassailable premise that the intention of the drafters was to disfranchise whites equally with blacks and that these type

measures were needed in order to mislead the whites into favoring these provisions.

8. Appellants' Exhibit 14, ignored by the Court below, which contains many quotations from the book *McMillan, Constitutional Development in Alabama, 1798-1901: A Study in Politics, The Negro and Sexualism,* demonstrating the balancing interest at the Convention of disfranchising whites as well as blacks for political reasons. This exhibit was introduced through Thornton and as an aid to his opinion.

9. The fact that the poll tax provisions, sections 178 and 194 of the Alabama Constitution of 1901 had the effect of disfranchising more whites than blacks and therefore was definitely part of the intention of the drafters to disfranchise poor whites as well as blacks. (J.A. pp. A-23-24).

10. Finally, it is paramount to point out one observation made by Dr. Thornton. He tells us not to be misled by reading or analyzing the proceedings of the Convention. He stresses that it "appears" that the themes of the speeches and debates at the Convention is to disfranchise blacks and not to disfranchise any whites. However, Dr. Thornton unequivocally reasons that this is misleading and false and these debates were intended only as a public relations ploy in order to convince the white electorate that they should vote for the articles adopted by the Convention because, in reality, after the expiration of the time limit set out in the temporary plan, that being section 180, which was only 13 months, the suffrage article had the intention to disfranchise poor whites equally, if not more, as blacks. (J.A. p. A-27).

The District Court correctly found that Section 182 was not passed with discriminatory intent. It also correctly found that the drafters at the Convention were concerned that whites, on sectional and class grounds, would vote, (J.S. E-4). The trial court was not erroneous in these conclusions but rather the Court below was mistaken and erroneous in ignoring and disregarding the testimony of Dr. Thornton and its evidentiary support and in reversing the District Court.

II. The Appellees' Burden and Permissible Motive.

The Eleventh Circuit pronounced that to establish a violation of the Fourteenth Amendment in the face of mixed motives, the Appellees must prove by a preponderance of the evidence that racial discrimination was a substantial and motivating factor in the adoption of section 182. The Appellees shall then prevail unless the Appellants prove by a preponderance of the evidence that the same decision would have resulted had the impermissible purpose not been considered. (J.S. p. A-5).

The Appellants assert that there was a failure to prove by a preponderance of the evidence that racial discrimination was a substantial and motivating factor in the adoption of section 182. To be sure, there was present at the Convention a motive equal to any suggested by the Appellees, that is the motive to disfranchise whites equally with blacks for the purpose of stemming the populist tide. In support of this proposition, Appellants would most earnestly submit the testimony of Dr. Thornton listed above and the evidentiary support for the same as well as the entire amount and kind of evidence introduced below by the Appellants, including affidavit testimony, the efficacy of the same being conceded by the Eleventh Circuit, that the section in question was administered without reference to race. (J.S. p. A-13 and R. p. 48).

In this connection, we cannot agree with the Eleventh Circuit's arbitrary strike of the pen in holding that *Village of Arlington Heights v. Metropolitan Development Corp.*, 429 US 252 (1977) supersedes language in *Palmer v. Thompson*, 403 US 217 (1977) to the effect that a permissible purpose will always defeat an impermissible motive. (J.S. p. A-7). This was the clear holding of *Palmer*, supra, in that the closing of city swimming pools was not found to be unlawful despite proof that the closing was motivated by a desire to avoid integration in light of proof that there was a permissible motive for the same, i.e. economics. *Palmer v. Thompson*, 403 US 217 p. 224. Despite assertions to the contrary by the Court

below, this Court did not disturb that rationale in the case of *Michael M. v. Superior Court of Sonoma County,* 450 US 464 (1981). In *Michael M.,* supra, this Court stated the following in support of the rationale cited above in *Palmer,* supra,

". . . In *Orr v. Orr,* . . ., for example, the Court rejected one asserted purpose as impermissible, but then considered other purposes to determine if they could justify the statute. Similarly, in *Washington v. Davis* . . . the Court distinguished *Palmer v. Thompson* . . ., on the grounds that the purposes of the ordinance there were not open to impeachment by evidence that the legislature was actually motivated by an impermissible purpose. . . ." (Citations omitted.)

Michael M., supra, 450 US 464 at p. 472 n.7.

As a matter of fact, in distinguishing *Palmer,* supra, this Court in *Davis* stated as follows:

". . . that the holding of the case was that the legitimate purposes of the ordinances — to preserve peace and avoid deficits — were not open to impeachment by evidence that the councilmen were *rationally motivated by racial considerations.* . . ." (Emphasis supplied).

Washington v. Davis, 426 US 229, 233 (1976).

Because the evidence is clear that there existed permissible motives for passing 182 or at least ones on an equal footing with any impermissible motive, the Appellees failed to meet their burden of proof. Hence, the Court below erred in holding to the contrary.

Even a finding that the Appellees met their initial burden of proof does not warrant reversal in this case. This is so because there was an obvious and very telling showing made by the Appellants that there were permissible motives which would have led to the passage of 182 without regard to any impermissible motives.

As support for the first permissible motive, that is the denial of the franchise to poor whites, we once again turn to the compelling testimony and evidentiary support offered by Dr. Thornton. Suffice it to say, his testimony reveals the existence

of a motive, at least equal if not superior to any other motive, to disfranchise poor whites for the purpose of stemming the populist tide then threatening to remove the Democratic Party from power. The Eleventh Circuit would have one believe that this motive was not advanced as a permissible purpose by the Appellants. (J.S. p. A-11, n., 12). However, as this Court can see, there was substantial evidence of this purpose. It is significant to note that the Eleventh Circuit apparently recognizes this motive and does not expressly or implicitly, for that matter, deny its existence or state that it is not a permissible purpose. The course chosen by the Court below was simply to ignore its existence.

Yet a separate but perhaps the single most important permissible motive involves the question of whether the state can constitutionally disfranchise those convicted of crimes involving moral turpitude even if the crime for which the individual was convicted carries a maximum sentence of less than 12 months incarceration. In examining this motive, the length of imprisonment is not compelling; rather, the important concern is whether the crime involves baseness, vileness or moral turpitude.

Section 182 allows disenfranchisement under the following circumstances:

1. Conviction of any of the specifically enumerated crimes in that section;
2. Conviction of any crime punishable by imprisonment in the penitentiary;
3. Conviction of any infamous crime; or
4. Conviction of any crime involving moral turpitude.

Since the Appellees concede and do not challenge the above portions of section 182 that allow disfranchisement for conviction of a crime punishable by imprisonment in the penitentiary or for conviction of infamous crimes, it is extremely important to note then that all the enumerated crimes in section 182, with the exception of (1) assault and battery on the wife which is no longer viable because of the case of *Hobson v. Pow*, 434 F. Supp. 362 (N.D. Ala. 1977), (2) living in adultery, which

is a felony only after three convictions and (3) miscegenation which no longer is punishable or viable, are felonies. However, Appellees still argue that the enumerated crime provision is invalid because some of the enumerated crimes have included within them misdemeanors, e.g., if one embezzles or steals under a certain amount of money or value, the conviction can only be a misdemeanor. However, all the crimes that are numerated in section 182 involve moral turpitude, and if the state can constitutionally disfranchise those who commit crimes involving moral turpitude, they can constitutionally disfranchise those convicted of the named crimes, regardless of whether the conviction is for a misdemeanor commission of the same. Significantly enough, the District Court in one of its opinions below found that all the non-felony crimes enumerated in section 182 which are now viable are crimes involving moral turpitude, a finding which is not contested or argued. (J.S. p. D-8).

To support the existence of this permissible motive we could begin by examining this Court's decision in *Richardson v. Ramirez,* 418 US 24 (1974). In analyzing that case, the following language from one of the opinions of the District Court states succinctly the Appellants' position:

. . . "The Court found 'affirmative sanction' in the second section of the Fourteenth Amendment. That section forbids the denial of the right to vote 'except for participation in rebellion, *or other crime*' . . . Although some of the discussion of the legislative history of the second section of the Fourteenth Amendment speaks specifically of felonies known at common law, the actual language of the section speaks only of 'any crime', and the Court is of the opinion that *Ramirez* may be properly applied to cases involving crimes other than felonies . . . ." (J.S. p. D-10).

A close study of the *Ramirez* opinion also demonstrates that the legislative intention was not to limit section 2 to felonies only but rather to have it applied to "other crimes". This sentiment is expressly seen in the following language from *Ramirez*:

". . . the legislative history bearing on the meaning of the relevant language of section 2 is scant indeed; the framers of the Amendment were primarily concerned with the effect of reduced representation on the states, rather than with the two forms of disenfranchisement which were exempted from that consequence by the language with which we are concerned here. *Nonetheless, what legislative history there is indicates that this language was intended by Congress to mean what it says.*" (Emphasis supplied)

Richardson v. Ramirez, 418 US 24, 43 (1974). Moreover, as this Court noted, the House of Representatives, where most of the debate took place on section 2, clearly intended this section not to be limited to felonies only but also to other crimes. *Richardson v. Ramirez,* 418 US 24, 45 (1974).

More importantly, *Ramirez,* supra, is authority for the proposition that a state may disfranchise some individuals that have committed crimes carrying a maximum punishment of less than 12 months incarceration and not others. As stated by Mr. Justice Renquist,

". . . Although the Court has never given plenary consideration to the precise question of whether a state may constitutionally exclude some or all convicted felons from the franchise, we have indicated approval of such exclusions on a number of occasions. In two cases decided toward the end of last century the Court approved exclusions of bigamists and polygamists from the franchise under territorial laws of Utah and Idaho . . . Much more recently we have strongly suggested in dicta that exclusion of convicted felons from the franchise violates no constitutional provision. In *Lassiter v. Northhampton County Board of Elections,* . . . ., where we upheld North Carolina's imposition of a literacy requirement for voting, the Court said 'residence requirements, age, previous criminal record . . . are obvious examples indicating factors which a state may take into consideration in determining the qualification of voters.' " (Citations omitted)

Richardson v. Ramirez, 418 US 24, 53 (1974).

Appellants would be remiss if they did not point out even what is obvious. *Lassiter,* supra, and the language from that case quoted above, makes no limitation in citing previous criminal record as a factor a state may take into consideration in determining the qualifications of voters. Certainly this case gives more than ample support for the position that a previous criminal record which includes the conviction of a crime involving moral turpitude is a permissible motive in disfranchising a voter.

This analysis poses an obvious conflict for this Court to decide. The Court below concluded that section 182 violated section 1 of the Fourteenth Amendment to the United States Constitution. However, it is now submitted that the State of Alabama has the right, pursuant to section 2 of the Fourteenth Amendment, to disfranchise those convicted of moral turpitude misdemeanors. If this is so, then the Court below erred in its holding. While not admitting that the framers of section 182 had the intention to discriminate against blacks, even if this was the case, the State of Alabama, pursuant to section 2 of the Fourteenth Amendment, would have the authority to still disfranchise moral turpitude misdemeanants. This Court's reliance on *Lassiter,* supra, and especially the language from that case recognizing the ability of the State to consider a previous criminal record in deciding the qualifications of voters, in reaching a decision in *Ramirez,* supra, suggests that the State of Alabama cannot be condemned for what happened in this case.

The significance of this rationale did not escape the Fifth Circuit in *Shepard v. Trevino,* 575 F. 2d 1110 (5th Cir. 1978), where the Court was presented with an equal protection argument concerning the re-enfranchisement of convicted felons. There, the State of Texas provided a mechanism for the re-enfranchisement of those convicted of state felonies but not those of federal felonies. On this ground, federal felons brought an action contending violation of the equal protection clause of the Fourteenth Amendment. The Fifth Circuit rejected these equal protection claims and held that the Texas

system of allowing subsequent re-enfranchisement of convicted state felons but not convicted federal felons was valid. Accordingly, this rationale which would sanction different treatment among the same class of individuals, i.e. felons, must be authority for sanctioning the difference in treatment among the same class of individuals in this case, that is misdemeanants. And, in examining previous criminal record and those whom shall be disfranchised, the state may attach more significance to crimes involving moral deprivity or baseness. See *Oregon v. Mitchell,* 400 US 117 (1970).

Although the disfranchisement herein question is sanctioned by section 2 of the Fourteenth Amendment, it is the additional contention of the Appellants that the State of Alabama has a compelling interest in disfranchising those who commit crimes involving moral turpitude, regardless of the length of punishment for the commission of such a crime. Consequently, the reason for the passage of section 182 would make no difference, the State not admitting in advancing any such argument that section 182 was passed with any discriminatory intent. In this regard, we would direct this Court to *Kronlund v. Honstein,* 327 F. Supp. 71 (N.D. Ga. 1971). In that case the plaintiff attacked a section of the Georgia Constitution on the ground that it unconstitutionally deprived her of rights guaranteed by the equal protection clause of the Fourteenth Amendment and by the First and Eighth Amendment to the Constitution. The provision in issue there, section 2 - 801 of the Georgia Constitution, disqualified those from voting who had been convicted of certain listed crimes or of any crime involving moral turpitude punishable by imprisonment in the penitentiary. Plaintiff had been convicted of smuggling heroin into the United States, a crime determined by the District Court to involve moral turpitude.

The *Kronlund* Court rejected plaintiff's contention that the provision was unconstitutional on its face and as applied to her. The Court recognized that a State may constitutionally disfranchise otherwise qualified voters because they have been convicted of a felony. However, the *Kronlund* Court went fur-

ther and found that disfranchising only those convicted of moral turpitude crimes and not those convicted of non-moral turpitude crimes served a compelling state interest. In so holding that Georgia had a compelling state interest in disfranchising those convicted of crimes involving moral turpitude, the Court noted as follows:

"A State has an interest in preserving the integrity of her electoral process by removing from the process those persons with proven anti-social behavior, whose behavior can be said to be destructive of society's aims. For this reason, a State may prohibit idiots and insane persons as well as those convicted of certain offenses from participating in her elections. A State may also legitimately be concerned that persons convicted of certain crimes may have a greater tendency to commit election offenses. Therefore, Georgia has a compelling State interest sufficient to justify the voting restrictions set forth in section 2-801 of the Georgia Constitution. Since the State does have this legitimate interest to protect, this provision does not unjustifiably abridge the plaintiff's First Amendment rights." *Kronlund v. Honstein,* supra, 327 F. Supp. 71, p. 73.

Not enough importance can be attached to the reasoning found in the case of *Washington v. State,* 75 Ala. 582 (1884). In that case, the Alabama Supreme Court, in a racially neutral context, some 17 years before the Constitutional Convention of 1901, recognized that the State had an interest in disfranchising those who had been convicted of a crime involving moral turpitude. As stated by the Court

". . . The presumption is that one rendered infamous by conviction of a felony *or other base offense indicative of great moral turpitude* is unfit to exercise the privilege of suffrage, or to hold office upon terms of equality with free men who are clothed by the State with a toga of political citizenship . . . ." (emphasis supplied)

Washington v. State, 75 Ala. 582, 585 (1884).

In concluding that the Appellants failed to meet their burden of proof that section 182 would still have been adopted had a permissible state reason been the sole consideration, the

Court below did not even discuss, let alone mention, the interest of the State in disfranchising moral turpitude misdemeanants pursuant either to the rationale concerning the *Ramirez,* supra case or the rationale espoused in *Kronlund,* supra. Instead, the Court held that it was unable to discern any evidence that section 182 was actually intended to serve the State interest in denying the franchise to those convicted of violating its laws, assuming without deciding that this asserted State interest would pass constitutional muster. (J.S. p. A-12). In support of that conclusion, the Court incredibly notes that there are glaring omissions from the non-prison offenses resulting in disfranchisement under section 182. It is this statement by the Court below which clearly portrays their failure to understand the issue involved and their misapplication of the appropriate and controlling law.

Obviously, the Court below is attaching great significance to the fact that all crimes not punishable by imprisonment in the penitentiary were not disfranchising, opining that if the Convention truly wished to vindicate a "good government" purpose it would have included such language in section 182. (J.S. p. A-12). However, the only non-prison offenses resulting in disfranchisement which are still viable in Alabama are either felonies or crimes involving moral turpitude. Clearly, the inclusion of a provision allowing disfranchisement for crimes involving moral turpitude was not meant to include all non-prison offenses, the interest and concern of the State being to disfranchise those only who committed crimes involving this element. Moreover, as already explained by Dr. Thornton, the listing of these specific offenses in section 182 changed nothing from the effect of the Constitution of 1875.

While criticizing the Appellants for underinclusiveness, the result reached by the Eleventh Circuit results in absurd consequences. In Alabama, the difference between grand or petty larceny, for example, is determined by the amount stolen, the determinative amount now being $25. Consequently, if one shoplifts articles of clothing from a store having a value of $25.01 they will be convicted of a felony and not be allowed

to vote while their partner, at the same time, could steal articles of clothing worth $24.99, and because this is a misdemeanor, still be allowed to vote. Such a situation defies logic and strips the State of its ability to disfranchise moral turpitude offenders. See *Butts v. Nichols,* 384 F. Supp. 573 (S.D. Iowa 1974). By trying to remove from the franchise those persons who have committed crimes involving moral turpitude, the State is simply trying to preserve the purity of the franchise. *Hobson v. Pow,* 434 F. Supp. 362 (N.D. Ala. 1977) and *Washington v. State,* 75 Ala. 582, 585 (1884) wherein it is recognized that the purpose of the denial of the right of suffrage was to preserve the purity of the ballot box.

While the above discussion demonstrates the propriety of disfranchising those convicted of moral turpitude crimes regardless of whether the crime is a felony or misdemeanor, there are some specific examples of cases where individuals have lost important rights on the basis of a conviction of a misdemeanor. In *Waddy v. Davis,* 445 F. 2d 1 (5th Cir. 1971), the plaintiffs pled guilty to receiving unemployment compensation benefits by reason of misrepresentation, this crime being a misdemeanor and one involving moral turpitude. Because of this conviction, which carried a punishment of a fine of not less than $25 nor more than $250 or imprisonment for no longer than 3 months or both, plaintiffs were stricken from the voting list because the crime involved moral turpitude.

The Fifth Circuit, in affirming the District Court's dismissal of plaintiffs' complaint which alleged they had not been advised they would be removed from the voting list at the time of their guilty plea, found the crime in question to be one involving moral turpitude and then stated the following:

"Plaintiff did not here contest the principle that the privilege of voting in a state is within the jurisdiction of the state itself, to be exercised as the state may direct and upon such terms as to it may seem proper, provided no discrimination is made between individuals in violation of the United States Constitution . . . The denial of the voting franchise to convicted

criminals raises no substantial constitutional question . . . ." (Citations omitted)

Waddy v. Davis, 445 F. 2d 1, 2-3 (1971). See *United States v. Tonry,* 605 F. 2d 144 (5th Cir. 1979), where the Court rejected a claim that an individual's First Amendment right had been denied where, as a condition to probation based upon guilty pleas to four misdemeanor violations, he was forbidden from running for any state or local office or engaging in political activity during the term of his probation.

In the face of these multitude of factors, this Court should have no difficulty in reversing the Court below and finding that there was in existence permissible motives which would have compelled the passage of section 182 in any event.

It cannot be gainsaid that the Tenth Amendment to the United States Constitution reserves unequivocally to the State their right to administer the electoral process and to set qualifications and conditions upon the exercise of the franchise. *Pope v. Williams,* 93 US 622 (94). There can be no argument that:

". . . to be sure, the administration of the electoral process is a matter that the constitution largely entrusts to the State . . . ."

Kusper v. Pontikes, 414 US 51 (1933).

It is suggested that at no time, despite frequent opportunity to do so, has this Court ever undermined or weakened this power left specifically to the States by the Tenth Amendment. Quite to the contrary, when given the opportunity, this Court has written sweeping and persuasive comments concerning the power of the State to control their elections, e.g. *Lassiter v. Northhampton County Board of Elections,* 360 US 45 (1959) and *Oregon v. Mitchell,* 400 US 112 (1970). As previously explained, this Court in *Lassiter* recognized the wide scope the State had in exercising its jurisdiction concerning the qualifications of voters, including previous criminal record. Moreover, and important for the purposes of this appeal, is the fact that this Court in *Lassiter,* supra, recognized the following:

"So while the right of suffrage is established and guaranteed by the Constitution . . . it is subject to imposition of the State standards which are not discriminatory and which do not contravene any restriction of Congress, acting pursuant to its constitutional powers, has imposed . . . ."

Lassiter v. Northhampton County Board of Elections, 360 US 45 (1959).

In reviewing this quote, it is significant to point out that in *Lassiter*, supra, this Court placed great weight on the fact that the literacy test was being applied in an equal and nondiscriminatory manner. Likewise, as admitted by the Eleventh Circuit in this case, the provisions of section 182 in question have been and are being implied in a neutral and nondiscriminatory manner.

Furthermore, these meaningful words from Mr. Justice Black have crucial significance to this case:

". . . It is obvious that the whole Constitution reserves to the States the power to set voter qualifications in State and local elections, except to the limited extent that the people through constitutional amendments have specifically narrowed the powers of the States . . . And the Equal Protection Clause of the Fourteenth Amendment was never intended to destroy the State's power to govern themselves . . . ." (Citations omitted)

Oregon v. Mitchell, 400 US 117, 27 L.Ed. 2d 272, 283, 91 S.Ct. 260 (1970). See also *Duncan v. Piothress*, 657 F. 2d 691, 702 (5th Cir. 1981), *United States v. Tonry*, 605 F. 2d 134, 148-149 (5th Cir. 1979) and *Holley v. Askew*, 583 F. 2d 728, 730 (5th Cir. 1978).

The opinion of the Court below has the effect of conflicting and interfering with these previous pronouncements of this Court. Section 182 allows disfranchisement for felonies and for crimes involving moral turpitude, whether felonies or not. This certainly seems to be a restriction within the realm of the authority and jurisdiction left to the states by the Tenth Amendment and as reinforced by this Court in the decision

cited above, especially in the context of a statute neutral on its face which has been uniformly applied. To elect to disfranchise non-felons who commit crimes involving moral turpitude is certainly within the sphere contemplated by the Tenth Amendment, it being obvious that in determining an individual's previous criminal record the State may attach more significance to crimes involving moral depravity or baseness, for such a distinction does not offend the equal protection clause of the Fourteenth Amendment. *See Oregon v. Mitchell*, supra.

The decision of the Court below violates the Tenth Amendment right of the State of Alabama to control its elections and to set the qualifications for the voters. To hold otherwise would destroy the complicated fabric woven by the framers of the United States Constitution and ratified by this Court in dealing with matters left to the States for consideration or ones in which the States interest must succumb to that of the Federal Government.

CONCLUSION

The Eleventh Circuit committed an eggregious error by authoring an opinion which violates and intrudes upon the very essence of our Constitution and system of government. They have told the State of Alabama that a provision allowing disfranchisement for the commission of a listing of crimes which were almost unanimously felonies or involved moral turpitude or for the commission of moral turpitude crimes generally is unconstitutional. They have told the State of Alabama that they could never pass a law which disfranchises individuals who commit moral turpitude crimes if there is also in existence an alleged impermissible motive, even though the provision in question is neutral on its face and has been applied in a nondiscriminatory manner. Carrying the logic of the Court below to its most unfortunate extremes, a law providing disfranchisement for murderers or for people who have been convicted of a violation of the public trust or election offenses would be striken down if there was also evidence that such a law was

passed because of the alleged existence of an impermissible motive.

Without admitting any discriminatory intent, Appellants would simply say that it would make no difference what their intentions were because the provision in question merely fulfilled a valid state interest, that is disfranchising those who have been convicted of crimes involving moral turpitude.

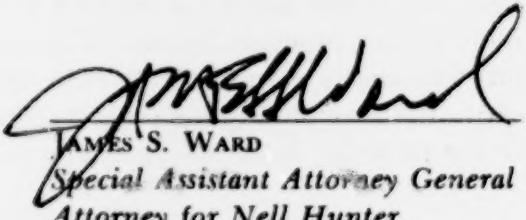
Obviously, the Court below failed to recognize the existence of permissible motives for the enactment of section 182 thereby allowing a State constitutional provision over 80 years in age to be striken. The Court below failed to consider evidence concerning the intention of the delegates to the Alabama Constitutional Convention of 1901 and in so doing did not consider the possibility of the existence of an intention equal to the one they found to be impermissible. In the face of a permissible and impermissible motive, the Court below failed to give any consideration to the permissible motive and chose rather to strike down the provision in question. In so doing, the Court below incorrectly interpreted this Court's decisions and as a result has unconstitutionally applied the Fourteenth Amendment to reach an erroneous result.

Moreover, the Court below failed to consider the right of the State, pursuant to the Tenth and the Fourteenth Amendment or because of an interest in purifying the ballot box or denying the vote to those convicted of violating its laws, to disfranchise those who commit crimes involving moral turpitude regardless of the length of confinement. These constitutional provisions serve as more than ample authority for permissible motives by the State of Alabama in enacting section 182 and also demonstrate the fact that the provision would have been enacted if the alleged impermissible motive had not been considered at all. It is incongruous and lacking in logic to state on one hand that the State has the right to disfranchise those who commit crimes involving moral turpitude but to ignore this right when one alleges that the vehicle for such disfranchisement was passed based upon an impermissible motive.

We can only conclude the Appellants demonstrated that the Appellees failed to carry their burden, that the Appellees carried theirs or that the Appellants had a constitutional right or separate state interest to pass the provision in question. In holding otherwise, the Court below erroneously voided as repugnant to the United States Constitution section 182 of the Alabama Constitution of 1901.

Based on the foregoing and all contained in this Brief, whether case law, evidence or argument, Appellants implore this Court to reverse the judgment of the Eleventh Circuit Court of Appeals and to affirm the Order of the District Court upon which this appeal was based.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, James S. Ward, a member of the Bar of the Supreme Court of the United States and counsel of record of Nell Hunter, et al, individually and on behalf of all other members of Board of Registrars in the State of Alabama, appellants herein, hereby certify that on November 21, 1984, pursuant to Rule 33, Rules of the Supreme Court, I served three copies of the foregoing Brief for Appellants on each of the parties herein as follows:

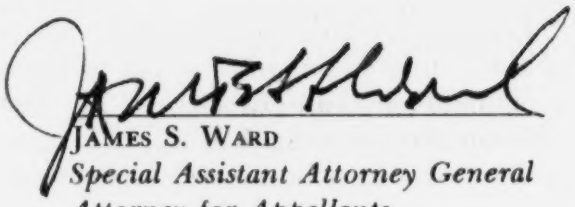
On Victor Underwood and Carmen Edwards, for themselves and all others similarly situated, appellees herein, by depositing such copies in the United States Post Office, Birmingham, Alabama, with first class postage prepaid, properly addressed to the post office address of Edward Still and Neil Bradley, the above named appellees counsel of record, at Edward Still, Suite 400, Commerce Center, 2027 First Avenue North, Birmingham, Alabama 35203 and Neil Bradley, ACLU Foundation, 52 Fairlie Street NW, Atlanta, Georgia 30303.

On the Solicitor General, Department of Justice, by depositing such copies in the United States Post Office, Birmingham, Alabama, with first class postage prepaid, properly addressed to the post office address of The Solicitor General, Department of Justice, Washington, D.C. 20530.

On William Bradford Reynolds, Assistant Attorney General, Charles J. Cooper, Deputy Assistant Attorney General and Brian K. Landsberg, Esquire, by depositing such copies in the United States Post Office, Birmingham, Alabama with first class postage prepaid, properly addressed to the post office address of William Bradford Reynolds, Assistant Attorney General, Charles J. Cooper, Deputy Assistant Attorney General and Brian K. Landsberg, Esquire, United States Department of Justice, Washington, D.C. 20530.

All parties required to be served have been served.

Dated: November 21, 1984



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STATE OF ALABAMA)
JEFFERSON COUNTY)

I, James S. Ward, depose and say that I am an attorney in the law firm of Corley, Moncus, Bynum, & DeBuys, P.C. and I am the attorney of record for Nell Hunter, et al, individually and on behalf of all other members of Board of Registrars in the State of Alabama, the appellants herein, and that on the 21st day of November, 1984, pursuant to Rule 33, Rules of the Supreme Court, I served three copies of the foregoing Brief for Appellants on each of the parties required to be served herein, as follows:

On Victor Underwood and Carmen Edwards, for themselves and all others similarly situated, appellees herein, by depositing such copies in the United States Post Office, Birmingham, Alabama, with first class postage prepaid, properly addressed to the post office address of Edward Still and Neil Bradley, the above named appellees counsel of record, at Edward Still, Suite 400, Commerce Center, 2027 First Avenue North, Birmingham, Alabama 35203 and Neil Bradley, ACLU Foundation, 52 Fairlie Street NW, Atlanta, Georgia 30303.

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All parties required to be served have been served.

JAMES S. WARD
Special Assistant Attorney General
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Sworn to and subscribed before
me this the 21st day of November, 1984.

Notary

Office-Supreme Court, U.
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No. 84-76

IN THE

Supreme Court Of The United States

October Term, 1984

NELL HUNTER, et al, individually, and on behalf of all other members of Boards of Registrars in the State of Alabama,
Appellants,

vs.

VICTOR UNDERWOOD and CARMEN EDWARDS, for themselves and all others similarly situated,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF THE APPELLEES

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7 January 1985

QUESTION PRESENTED

Did the Court of Appeals err in holding that Section 182 of the 1901 Alabama Constitution was enacted with a racially discriminatory purpose and continues to have a racially discriminatory effect?

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ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF THE APPELLEES

CONSTITUTIONAL PROVISION

Constitution of Alabama, 1901

Section 182. The following persons shall be disqualified both from registering, and from voting, namely:

All idiots and insane persons; those who shall by reason of conviction of crime be disqualified from voting at the time of the ratification of this constitution; those who shall be convicted of treason, murder, arson, embezzlement, malfeasance in office, larceny, receiving stolen property, obtaining property

or money under false pretenses, perjury, subornation of perjury, robbery, assault with intent to rob, burglary, forgery, bribery, assault and battery on the wife, bigamy, living in adultery, sodomy, incest, rape, miscegenation, crime against nature, or any crime punishable by imprisonment in the penitentiary, or of any infamous crime or crime involving moral turpitude; also, any person who shall be convicted as a vagrant or tramp, or of selling or offering to sell his vote or the vote of another, or of buying or offering to buy the vote of another, or of making or offering to make a false return in any election by the people or in any primary election to procure the nomination or election of any person to any office, or of suborning any witness or registrar to secure the registration of any person as an elector.

STATEMENT OF THE CASE

The end of Reconstruction opened the way for "the white citizens of Alabama *** to reassert their once unquestioned political supremacy. The 1890's ushered in an era of disfranchisement not only in Alabama but throughout the South." Opinion of the Court of Appeals, J.S. A-8. With the rise of populism in the 1890s the black vote had acquired added leverage. *Id.* "[T]he blacks became the block of votes that would decide which party's candidates got elected." Brief of Appellants, 14. The court of appeals, in part relying upon the decision of *United States v. Alabama,* 252 F.Supp. 95, 98 (M.D. Ala. 1966) (three-judge court), found that "[w]hites, Democrats and Populists alike, vied for black ballots in any way they could, with favors, pardons of convictions, outright vote purchase and massive electoral fraud." Both courts below agreed that the turn of the century conventions were spurred on by a concern of federal intervention, J.S. A-8, E-3, especially by the narrow defeat of the Lodge force bill in the United States Senate in 1890, which called for tighter federal control of all phases of voting, from registration to ballot tabulation. The most effective way to avoid federal intervention while accomplishing

their goals, the reformers believed, was to eliminate the Negro vote. According to the court of appeals (J.S. A-9):

> In the words of one delegate to the 1901 convention, "Now we are not begging for 'ballot reform' or anything of that sort, but we want to be relieved of purchasing the Negroes to carry elections. I want cheaper votes." ***
>
> When the Alabama Constitutional convention assembled in May 1901, the question was not whether to disfranchise the Negro but rather how to do so constitutionally. In his opening address John B. Knox, the president of the convention, declared:
>
> > And what is it that we want to do? Why it is[,] within the limits imposed by the Federal Constitution, to establish white supremacy in this State.
>
> I *Official Proceedings* [*of the Constitutional Convention of the State of Alabama, May 21st, 1901 to September 3rd, 1901*] at 8; . . . In Knox' words, "if we would have white supremacy, we must establish it by law—not by force or fraud." I *Official Proceedings* at 9.

The court of appeals found that the Convention's suffrage committee, borrowing from the successful methods of the Second Mississippi Plan and those of other Southern states, sought to achieve the convention's objective "by setting on devices that would subvert the guarantees of the fourteenth amendment without directly provoking a legal challenge." J.S. A-9. Multiple devices were adopted because of a concern that one or more of the methods might be held invalid. The court of appeals noted that this was a well-founded fear, for a grandfather clause similar to Alabama's was struck down in *Guinn v. United States,* 238 U.S. 347 (1915), and Alabama's poll tax was held unconstitutional in *United States v. Alabama,* 252 F.Supp. 95 (M.D.Ala. 1966) (three-judge court). J.S. A-10, nn. 9 and 10.

The Alabama Constitution of 1901's suffrage article contained a temporary plan and a permanent plan. The temporary plan in Section 180 (to be used for 13 months after the ratification of the constitution) allowed enfranchisement based on (i) honorable service of the voter or one of his ancestors in the United States or Confederate armed forces (the "grand-

father clause"), or (2) the voter's good character and understanding of the duties and obligations of citizenship. "It was agreed that at least ninety-five percent of those registering under the soldiers and descendants clause would be white soldiers ***." McMillan, *Constitutional Development,* 287. The grandfather clause was placed in the temporary plan because of the fear throughout the state that white registration boards would not be fair to white men (as reported in Mississippi) in administering the good character and understanding clauses. III *Official Proceedings,* 2958, 3033.

The permanent plan in Section 181, effective in 1903, authorized the enfranchisement of any person (1) who could read and write and who had been regularly employed for most of the past 12 months or were physically incapacitated from doing one or the other, or (2) who owned (or whose wife owned) at least 40 acres or real or personal property assessed for taxation for three hundred dollars.

Section 182, the only section at issue here, applied under both the temporary and permanent plans.

The appellees, Victor Underwood and Carmen Edwards, challenged Section 182 of the Alabama Constitution which required disfranchisement for misdemeanors included either in a list of crimes or under the rubric of "involving moral turpitude." Both appellees had been affected by the operation of Section 182 because each had been convicted of uttering a worthless instrument (writing an insufficient funds check). Underwood had been purged from the roll of qualified electors by the Jefferson County Board of Registrars, and Edwards had not been allowed to register by the Montgomery County Board of Registrars.

Suit was filed in federal district court in 1978 against the registrars of Jefferson and Montgomery Counties. The plaintiffs and defendants were both certified as class representatives. J.S. D-2. Five causes of action were presented. The only claim ruled on by the court of appeals, and presented for review here, is the claim that section 182 was specifically adopted to disfran-

chise blacks on account of race and has had and continues to have that effect.[1]

SUMMARY OF ARGUMENT

The record presented to the district court established without contradiction that the Alabama Constitutional Convention of 1901 was convened for the purpose of reestablishing white supremacy. Both courts below so found, the expert witnesses for both the State of Alabama and the plaintiffs so testified, and they are in agreement with all historians who have published on the subject.

The convention adopted several suffrage provisions intended to effectuate the discriminatory purposes of the delegates. The provision at issue here disfranchises those convicted for the commission of certain misdemeanors. The plaintiffs did not question the authority of the State of Alabama to disfranchise for the commission of a crime, but only the discriminatory motivation for and result of the misdemeanors selected by the delegates to the 1901 convention and embodied in Section 182 of the State constitution.

The State's defense of this provision is *that although it admits Section 182 was intended to disfranchise blacks, the provision should not be held unconstitutional because there was also an intent to disfranchise poor whites.* The State makes no defense of the fact that discrimination aimed at *all* blacks and *some,* specifically poor, whites, remains discrimination in the

[1]The complaint also alleged that the fundamental right to vote on an equal basis with other citizens was being denied without a compelling state interest, that the disfranchisement provisions were a discriminatory denial of equal protection, and that the moral turpitude provision was vague and indefinite. The complaint was later amended to allege that the suffrage provisions of the 1901 Constitution violated the Act of Readmission, Act of 25 June 1868, ch. 70, 15 Stat. 74. The district court ruled against plaintiffs on all causes of action, and all were properly presented and argued to the court of appeals. Plaintiffs, appellees here, contend that the record supports their claims on all causes of action, and will rely upon all claims as alternative grounds if the case is remanded to the court of appeals.

elective franchise. With a leap of logic, the State merely does not view this as discrimination. Since the delegates to the 1901 convention were bent on establishing white supremacy of the conservative Democrats, the State defends the disfranchisement of blacks as "politically" motivated.

The district court found that while the motivation of the convention was to discriminate against blacks, Section 182 was not unconstitutional because there was no evidence that this particular provision was so intended. The court of appeals properly ruled this finding to be clearly erroneous. It found the record uncontradicted that Section 182 was intended to discriminate on the basis of race. It further found that the record in this case established that Section 182 had an overwhelmingly racially discriminatory effect in 1901 and at the time of trial.

The evidence shows that the misdemeanor clauses of Section 182 continue to have a disparate impact on blacks. The evidence in the record shows that Section 182's selective list of misdemeanors causes the disfranchisement of blacks at 1.7 or more times the rate for whites. J.S. A-11.

The district court also ruled that if there were any legitimate motivation for Section 182, its discriminatory motive would be of no consequence. The court of appeals, having ruled that plaintiffs had indeed established a *prima facie* case of the racially discriminatory purpose underlying Section 182, went on to apply the proper tests for determining the constitutionality of a provision alleged to discriminate on the basis of race in access to the elective franchise. Applying well-settled precedents of this Court, the court of appeals reviewed the provision with close constitutional scrutiny, requiring the State to demonstrate, in view of the *prima facie* proof of discrimination, that the provision was necessary to promote a compelling state interest, *Crawford v. Board of Education,* 458 U.S. 527 (1982), and to be the least drastic means available to achieve that interest, *Kramer v. Union Free School District,* 395 U.S. 621 (1969). It further required the State to establish by a preponderance of the evidence that it had a permissible motive in

adopting Section 182, *Mt. Healthy City Board of Education v. Doyle,* 429 U.S. 274 (1977), and that it would have done so even in the absence of the discriminatory motive. *Personnel Administrator of Massachusetts v. Feeney,* 442 U.S. 256 (1979).

Carefully reviewing the record in applying these tests, the court of appeals concluded that the State had not established that any reason other than invidious racial discrimination was the motivation for the adoption of Section 182, and reversed and remanded with directions.

ARGUMENT

This case presents a fairly simple point. The appellant registrars (hereafter referred to as "the State") argue that even though the 1901 Constitutional Convention adopted the petty crimes provision in Section 182 for the purpose of disfranchising substantially all blacks, the provision does not violate the Equal Protection Clause of the Fourteenth Amendment because there was also an intent to disfranchise poor whites. This dual motive does not alleviate the infirmity of the provision because the other motive itself is constitutionally invalid and under the well-settled precedents of this Court, the State failed to prove those elements necessary for even a legitimate motive to outweigh an admittedly racially discriminatory motive.

Section 182 is the last vestige of the discriminatory suffrage provisions of the 1901 Constitution of Alabama. The "grandfather clause" was effectually overturned by this Court's decision in *Guinn v. United States,* 238 U.S. 347 (1915). The poll tax was declared unconstitutional in *United States v. Alabama,* 252 F.Supp. 95 (M.D.Ala. 1966) (3-judge court), and the literacy, "understanding," and property ownership clauses were suspended by the Voting Rights Act of 1965, 42 U.S.C. §1973 *et seq.* This "long and sorry history of resistance to the Fifteenth Amendment's ringing proscription of racial discrimination in voting," *City of Richmond v. United States,* 422 U.S. 358, 379 (1975) (Brennan, J., dissenting) adopted by Alabama's disfranchising convention has lasted eighty-four years.

I. It is uncontradicted in this record that Section 182 was part of a set of invidiously discriminatory restrictions on suffrage. The court of appeals properly held that the district court finding that there was no discriminatory purpose was clearly erroneous.

The district court specifically held, "A major purpose of these conventions [in Southern states beginning in 1890] was to disenfranchise blacks," J.S. E-4, and held the same was true in Alabama: "The [Alabama] convention had met to establish 'white supremacy by law' and to overthrow the revolutionary methods of 'force and fraud used in Alabama since Reconstruction [to curtail black voting power] lest representative government perish in Alabama,'" *id.*, quoting McMillan, *Constitutional Development in Alabama, 1798-1901: A Study in Politics, the Negro, and Sectionalism,* 267-8 (1955) (who was quoting the president of the convention).[2] Despite its finding of a discriminatory purpose for the whole convention, the district court held that the "intent as to the provision involved here has not been proven." J.S. E-7. This finding was clearly erroneous.

Historians who have published accounts of the suffrage features of the Alabama Constitution of 1901 agree that Section 182 was among the key features of the convention's successful effort to disfranchise black voters. All scholars recognize that many of the delegates of the 1901 convention also intended to disfranchise some poor whites as well. No one has ever disputed in a published work, however, that Section 182 and its companion suffrage provisions were primarily intended by the constitutional convention to eliminate as many black voters as possible.

The expert witnesses for both sides also agreed that some of the delegates to the 1901 convention intended to disfranchise blacks and some poor whites. J.S. 19, 30. The latter is not surprising for this was, after all, a convention controlled by the

[2]McMillan's work was cited at trial by both attorneys, both expert witnesses, and is cited by both the district court and appellate opinions. J.S. A-8, E-4.

Democratic Party, and it was poor whites who had left the Democratic Party to become the backbone of the Populist Party. J.A. 19. This intent to disfranchise poor whites became the sole evidentiary defense by the State for Section 182. Brief of Appellants, 9. Even this thin reed was destroyed by the State's own expert. In discussing the relative importance of the disfranchising all blacks and poor whites, the State's expert witness testified it was "the courting of [the black vote that] had represented the principal threat from the point of view of conservative white democrats ***." J.A. 19.[3]

The opening remarks of convention president John B. Knox set the tone for the convention:

> And what is it that we want to do? Why[,] it is within the limits imposed by the Federal Constitution, to establish white supremacy in this State.

I *Official Proceedings,* 8 (cited by the court of appeals, J.S. A-9). All historians agree that the Convention wanted to disfranchise blacks, but usually disguised its motive by resort to rhetoric.[4]

Sheldon Hackney describes the work of the suffrage committee that drafted the disfranchising provisions, including Section 182:

> It drew on the suffrage provisions of other Southern states, as well as many ordinances submitted by delegates, sent by constituents, and published by newspapers. Through the month of June the committee debated in private the suggestions of how best to disfranchise the Negro. Even without diabolical registrars, the constitution could eliminate Negroes by applying tests that took advantage of

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[3]"Since the [P]opulists were made up of predominantly poor whites and the Democratic party predominantly rich and conservative whites, the blacks became the block of votes that would decide which party's candidates got elected." Brief of Appellants, 14.

[4]The delegates often referred to, and distinguished between, the "ignorant and vicious" and the "intelligent and virtuous," J.A. 25 and McMillan at 269. Dr. Thornton, the State's expert witness, testified that these were code words for the desire to disfranchise practically all the blacks and lower class whites. J.A. 25.

> differing social conditions. Property tests, literacy tests, residence requirements, the poll tax, and disqualification for conviction of certain crimes all fell into this category.

Hackney, *Populism to Progressivism in Alabama,* 192 (1969) (footnotes omitted) (cited by the court of appeals, J.S. A-9).

The two expert witnesses — one called by each party — agreed that Section 182 had a discriminatory purpose. Dr. Thornton[5] (the State's expert) testified that "[t]he aim of the 1901 Constitutional Convention was to prevent the resurgence of Populism by disenfranchising practically all of the blacks and a large number of whites," J.A. 25; see also J.A. 27. Dr. Kousser[6] (the plaintiffs' expert) was more specific about the intent of Section 182. Dr. Kousser agreed with Dr. Thornton as to the purpose of the convention but also relied on the intent of the author of Section 182 (stated publicly when he introduced the provision) that he had written the section to disfranchise Negroes principally and disproportionately, J.A. 31.

The leading treatise on the 1901 Constitutional Convention, that of Malcolm C. McMillan, also concluded that Section 182 had a discriminatory purpose. The provision that became Section 182 was never a matter of controversy, McMillan explains, either in the committee or in the convention as a whole.

> Most of the proposals disqualified persons committing any one of a long list of petty as well as serious crimes which the Negro, and to a lesser extent the poor whites, most often committed. *** Most of the crimes contained in the report of the suffrage committee came from an ordinance by John Fielding Burns, a Black Belt planter. The crimes he listed were those he had taken cognizance of for years in his justice of the peace court in the Burnsville district, where nearly all his cases involved Negroes.

McMillan, *Constitutional Development,* 275 (cited by plaintiffs' expert, Kousser, J.A. 31, and the court of appeals, J.S. A-11).

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[5]Dr. J. Mills Thornton III is Professor of History of the South at the University of Michigan.

[6]Dr. J. Morgan Kousser is Professor of History and Social Science at the California Institute of Technology.

Many of the previous proposals had specified disfranchisement as a result of criminal convictions, and Burns incorporated these references in his own recommendation.[7] Burns began, however, with the following original suggestion: "Those who are bastards, or loafers who may be infected with any loathsome or contagious disease shall not be allowed to register, vote, or hold office." I *Official Proceedings,* 511. As Kousser testified, after citing this evidence, "It was, of course, common at the time for whites to think that those traits were predominant among blacks." J.A. 31. This wording was not incorporated into the final version of Section 182, but his second clause was adopted with only limited changes:

> 2. Those who shall have been convicted of treason, bribery, forgery, larceny, robbery, bigamy, seduction, incest, murder, rape, or any attempt to rape, arson, or an attempt to burn houses or property, burglary, or an attempt to burglarize, embezzlement, crime against nature, malfeasance or misfeasance in office, vagrancy, or obtaining money or goods under false pretense, who have not been pardoned and restored by the proper authorities.

I *Official Proceedings,* 511. Compare the final version of Section 182, *supra,* pp. 1-2.

The third clause in Burns' proposal would have disfranchised "Those who are descendants of parents, who are of or descendants of two or more different races." I *Official Proceedings,* 511. As adopted by the convention, Section 182 only disqualified those "convicted of *** miscegenation" rather than those of mixed race.

Although the development of Section 182 can be traced through the Convention records, there was little debate on this measure. There was more debate on other sections, such as the "fighting grandfather clause" or the literacy test; they were more controversial because of their application to whites. J.A. 29. But the expert witnesses for both sides agreed that the con-

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[7] I *Official Proceedings,* 114, 125-6, 129, 135, 150, 153, 161, 162, 198, 208, 219, 250, 275, 276, 301, 313, 330, 338, 340-41, 384, 389, 394, 424, 428, and 433.

vention record as a whole must be considered to determine the intent of the delegates on Section 182. J.A. 16, 29. They examined direct and indirect evidence. Kousser concluded, and the State's expert did not disagree:

> Most of the evidence as to the intentions of the framers of Section 182 is indirect, but all of it points in the same direction. The section was designed to have a racially discriminatory disproportionate impact on blacks, drafted by ingenious lawyers who were trying to circumvent the Fourteenth and Fifteenth Amendments while seeming not to violate their letter.

J.A. 32.

In one of the early scholarly studies of Southern disfranchisement, Paul Lewinson noted that Alabama's "petty crimes" provision was common throughout the region at the turn of the century. "The list of crimes involving disfranchisement diversified until it included petty larceny, wife-beating, and similar offenses peculiar to the Negro's low economic and social status." Lewinson, *Race, Class, and Party: A History of Negro Suffrage and White Politics in the South,* 81 (1932) (cited by Kousser, Kousser deposition at 9).

The use of criminal provisions in a racially discriminatory way as a disfranchising device had a long history in Alabama itself. The Constitution of 1875 disfranchised all persons convicted of larceny, among other crimes. One historian of the state argues that this was understood as a racial qualification:

> Another legal device that deprived many Negroes of the ballot was the inclusion of the word *larceny* in the disfranchising section of the 1875 Constitution. While previous constitutions had disfranchised anyone guilty of a penitentiary offense, such as *grand* larceny, the new Constitution was interpreted as withdrawing the ballot from those guilty of *petit* larceny.

Going, *Bourbon Democracy in Alabama, 1874-1890,* 34 (1951) (emphasis in original) (cited by Kousser, Kousser deposition at 10).

With this sort of tradition behind it, the racial implications of Section 182 of the Alabama Constitution of 1901 -- clear enough merely from an examination of the work of the convention that drafted it -- are made clear.

The list of crimes, as predicted, had a disproportionate impact on blacks. Dr. Thornton examined published reports of the number of inmates and found that 94% of the persons in county jails (misdemeanants) in 1901-2 were black. By comparing these figures with population statistics and registration figures before and after the adoption of the Constitution of 1901, Dr. Thornton concluded that 90% of the persons initially disfranchised by Section 182 were black, J.A. 25-6.

The case reviewed by the court of appeals thus contained substantial evidence presented by both sides that the purpose of Section 182 was to disfranchise blacks. There was no contrary evidence. For the district court to hold "intent as to the provision involved here has not been proven" is contrary to all the evidence. The court of appeals "on the entire evidence [was] left with the firm and definite impression of error by the court below with respect to the issue of intent." J.S. A-11; *United States v. U. S. Gypsum Co.*, 333 U.S. 364, 395 (1948).

II. Section 182 was properly held unconstitutional given its invidious racial intent, the uncontradicted evidence that it had and continues to have the intended racial effect, and the State's failure to establish any legitimate motive for its enactment.

The court of appeals held that the plaintiffs had to prove that Section 182 of the 1901 Constitution was adopted for the purpose of disfranchising large numbers of blacks in order to establish a violation of the Fourteenth Amendment, J.S. A-5. *Rogers v. Lodge*, 458 U.S. 613, 617 (1982); *City of Mobile v. Bolden*, 446 U.S. 55, 66-7 (1980) (plurality opinion); *Washington v. Davis*, 426 U.S. 229, 240 (1976).[8] The plaintiffs met

[8]To hold that the existence of a permissible motive ends the inquiry would destroy several principles long embedded in our law; for example, that acts generally lawful may become unlawful when done to accomplish

this burden. The historical evidence supports this conclusion. Indeed, the State's own expert admitted as much. As the State's brief said in summarizing their expert testimony, "the entire suffrage article *had the intention to disenfranchise poor whites equally as well as blacks.*" Brief of Appellants, 11 (emphasis in original).[9]

This admission by the State establishes that part of the plaintiff-appellees' initial burden of proof to prove "that the decisionmaker *** selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979).

The court of appeals held that the proper inquiry, once discriminatory motive and impact have been shown, is stated by *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 271 n.21 (1977), and *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274, 287 (1977), J.S. A-5.[10] The inquiry then became, given the existence of the

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an unlawful end, *City of Richmond v. United States*, 422 U.S. 358, 379 (1975), and a constitutional power cannot be used to attain an unconstitutional result. *Western Union Telegraph Co. v. Kansas*, 216 U.S. 1 (1910).

[9]The State repeatedly uses the word "equally" in referring to the intent of the 1901 Convention to disfranchise blacks and poor whites. The evidence does not support any contention that the disfranchisement of the two groups was "equal." The State's own expert testified that the number and proportion of blacks disfranchised by the 1901 Constitution was far greater than for whites. J.A. at 25-6. More importantly, State's brief concedes that "poor" whites, not all whites, were to be disfranchised, while *all* blacks, regardless of their economic status, were to be disfranchised. There was no intent to be "equal."

[10]In *Arlington Heights*, this Court held as follows:

> Proof that the decision by the Village was motivated in part by a racially discriminatory purpose would not necessarily have required invalidation of the challenged decision. Such proof would, however, have shifted to the Village the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered.

429 U.S. at 271 n.21. In *Mt Healthy* this Court held that a school board, when dismissing a teacher for both valid and invalid reasons, must show as follows:

impermissible motive, whether the state authorities had proved by a preponderance of the evidence that any other motive both existed and would have led to the adoption of Section 182. The court also held that, given the proof of racial motivation and that this affected the elected franchise, the State was required to demonstrate that any permissible motive was

> compelling, *Crawford v. Board of Education*, 458 U.S. 527, 536 *** (1982), and the means employed must be precisely drawn to accomplish exactly the objective that the state purports to further. *Kramer v. Union Free School District*, 395 U.S. 621, 632 *** (1969).

J.S. A-5-6. The State has failed to do so in this case because it has failed to prove such permissible motives existed. The State bases its defense on the theory that any plausible argument will expiate the invidiously discriminatory intent of Section 182. The court of appeals properly rejected this argument.

The State argues that *Washington v. State*, 75 Ala. 582 (1884), provides a permissible motive for the adoption of Section 182. This argument is faulty for two reasons: First, no one mentioned *Washington v. State* in the suffrage debates of 1901, while schemes to disfranchise blacks were openly discussed. J.S. A-13 n.14. Second, the court of appeals noted that such a "good government" rationale is undercut by the omission of misdemeanors relatively more serious than writing a bad check – such as second degree manslaughter, assault on a police officer, assault and battery, mailing pornography, and aiding the escape of a misdemeanant. J.S. A-12 n.13.

The State also argues that Section 2 of the Fourteenth Amendment supports the adoption of Section 182.[11] Again

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> [T]he District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's employment even in the absence of the protected conduct.

429 U.S. at 287.

[11]The appellees do not agree that the Fourteenth Amendment's use of the term "other crime" includes misdemeanors. The same Congress which proposed the Fourteenth Amendment adopted the Reconstruction Act providing for reestablishment of civil government in the rebel states by

there is no evidence that this point was ever discussed at the Convention. In any case, while Section 2 allows the disfranchisement of those "less than twenty-one years of age" or within the class of those convicted for "participation in rebellion or other crime," it does not allow states to discriminate invidiously within those classes. Similarly, the Twenty-first Amendment permits the states to regulate the transportation, importation, and use of intoxicating liquors, but the Amendment provided no sanctuary for invidious gender-based discrimination. *Craig v. Boren*, 429 U.S. 190 (1976).[12]

The State argues that the Tenth Amendment leaves the states an unfettered hand in the regulation of the elective franchise, quoting a sentence from *Kusper v. Pontikes*, 414 U.S. 51, 57 (1973). Brief of Appellants, 29. *Kusper* did not so hold, and the sentence from that opinion immediately following the State's quote makes that clear: "[I]n exercising their powers of supervision over elections and in setting qualifications for

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conventions elected by adult males "except such as may be disenfranchised for participation in the rebellion or for felony at common law," Act of 2 March 1867, ch. 153, 14 Stat. 428, §5. The next two Congresses adopted a series of acts readmitting rebel states to the Union

> upon the following fundamental condition: That the Constitution of [the readmitted state] shall never be so amended or changed as to deprive any citizen or class of citizens of the United States of the right to vote who are entitled to vote by the constitution herein recognized, except as a punishment for such crimes as are now felonies at common law •••.

Act of 22 June 1868, ch. 69, 15 Stat. 72; Act of 25 June 1868, ch. 70, 15 Stat. 73; Act of 26 January 1870, ch. 10, 16 Stat. 62; Act of 1 February 1870, ch. 12, 16 Stat. 63; Act of 23 February 1870, ch. 19, 16 Stat. 67; Act of 30 March 1870, ch. 39, 66 Stat. 80; Act of 15 July 1870, ch. 299, 16 Stat. 363. The use of the term "felony" in the readmission legislation suggests that the term "crimes" in the Fourteenth Amendment was similarly limited. Any other reading would mean Congress would be requiring suffrage for persons in state readmission conventions whom it would otherwise allow the states to disfranchise.

[12]In *Richardson v. Ramirez*, 418 U.S. 24, 56 (1974), this Court held that Section 2 of the Fourteenth Amendment allowed the disfranchisement of all felons, but remanded for consideration of the "alternative contention that there was such a total lack of uniformity in county election officials' enforcement of the challenged state laws as to work a separate denial of equal protection •••."

voters, the States may not infringe upon basic constitutional protections." 414 U.S. at 57.

Finally, the State has argued throughout this case that the intention of the 1901 Convention was to disfranchise blacks and poor whites. Presumably, they are arguing that disfranchisement based on income or wealth is permissible — if not laudatory. Indeed, the 1901 Constitution explicitly discriminated against the poor. Section 181 (the permanent plan of suffrage) established two classes who could register: first, those who could read and write English and had been regularly engaged in work (with exceptions for those physically unable to do one or both); and second, the owner or husband of the owner of forty acres of land, or real or personal property assessed for three hundred dollars or more. To this explicit wealth-based classification was added an annual poll tax of one dollar fifty cents.[13]

The State must show that this anti-poor rationale met some compelling state interest. It has suggested none. The decisions of this Court in *Kramer v. Union Free School District*, 395 U.S. 621 (1969), and *Hill v. Stone*, 421 U.S. 289 (1975), have held that property-ownership requirements are not valid for enfranchisement in any general-purpose elections.

Beyond establishing the overwhelming disparate impact of Section 182 immediately after its adoption, appellees established the disparate impact in the four years prior to suit in Jefferson and Montgomery counties (which the district court held to be typical of the other counties when it certified their registrars as class representatives, J.S. D-2). The court of appeals found:

> In Jefferson and Montgomery Counties blacks are by even the most modest estimates at least 1.7 times as likely as

[13]Since three-quarters of Alabama's families earned less than sixty-four dollars a year, the poll tax was a significant burden. Kousser, *The Shaping of Southern Politics: Suffrage Restrictions and the Establishment of the One-Party South, 1880-1910*, 64 (1974). The tax was cumulative from year to year, so that the poll tax "pile[d] up so high that he [would] never be able to vote again," according to one delegate. McMillan, *Constitutional Development*, 300.

> whites to suffer disfranchisement under section 182 for the commission of nonprison offenses.

J.S. A-11. This sort of disparity requires something more in rebuttal than the vague homilies the State has offered about disfranchising immoral people. At no time has the State offered contrary evidence or even disputed the disparate impact of Section 182, historically or currently.

These results are more than an important starting point, *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977); they strongly buttress the proof of intent to discriminate on the basis of race. They further demonstrate that Section 182 is not an historical remnant of no consequence. It has a continuing impact on black citizens of Alabama. It is continuing invidious racial discrimination of long standing.

Once an injury has been shown (injury such as restriction of speech or racially discriminatory impact), the burden shifts to the state to show (a) its valid interest (motive) and (b) the necessity of the means the State has chosen to implement its interest. The former must be "a compelling state interest" and the latter must be "the least restrictive means necessary." *Dunn v. Blumstein*, 405 U.S. 330, 336, 342, 353 (1972). Section 182 is a "state action that inhibits an individual's right to vote" and "must be tested by the strictest of constitutional standards," *City of Mobile v. Bolden*, 446 U.S. 55, 83-4 (1980) (Stevens, J., concurring); *see also, Rogers v. Lodge*, 458 U.S. 613, 630 (Powell, J., dissenting).

The existence of a compelling state interest is not a matter for conjecture or theory by the state's lawyers. It must be one actually held by the state as evidenced by an authoritative state body, either the legislature or the state court. In *Sherbert v. Verner*, 374 U.S. 398, 407 (1963), this Court refused to consider a rationale suggested for the first time on appeal by the state's attorneys because the state court had not expressed a view of this asserted state interest. *C.f., Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, 470 (1981) (the purpose had been articulated by the state supreme court).

As noted above, the court of appeals found *no* evidence in the record that the Convention intended any "good government" reasons for the expansion of the list of disfranchising crimes. J.S. A-12. The State's failure to introduce any admissible evidence which would rebut the appellees' *prima facie* case of discriminatory motive supports the decision of the court of appeals.

CONCLUSION

The affirmance of the decision below will only prohibit the State of Alabama from discriminatorily disfranchising on the basis of misdemeanors. It will not stop disfranchisement for felonies, nor will it bar the State from adopting a nondiscriminatory provision for the disfranchisement of misdemeanants. "Equal protection of the laws is not achieved through indiscriminate imposition of inequalities." *Shelly v. Kramer*, 334 U.S. 1, 22 (1948). The decision below should be affirmed because it is completely supported by the evidence and the law.

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No. 84-76

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

NELL HUNTER, *et al.* individually and on behalf of all other members of the Board of Registrars in the State of Alabama,

Appellants,

VS.

VICTOR UNDERWOOD and CARMEN EDWARDS, for themselves and all others similarly situated,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR *AMICI CURIAE* NAACP AND AMERICAN JEWISH COMMITTEE IN SUPPORT OF AFFIRMANCE

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Village of Arlington Heights v. *M.H.D.C.*, 429 U.S. 252 (1976) 7

Other Authorities:

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Tribe, *American Constitutional Law*, (1979) 7

No. 84-76

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

NELL HUNTER, *et al.* individually and on behalf of all other members of the Board of Registrars in the State of Alabama,

Appellants,

vs.

VICTOR UNDERWOOD and CARMEN EDWARDS, for themselves and all others similarly situated,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE AND AMERICAN JEWISH COMMITTEE *AMICI CURIAE*

Interest of the *Amici*

The NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE (hereinafter "NAACP"), the nation's oldest and largest civil rights organization, directly represents the interests of hundreds of thousands of Black American members. The association was formed in the first decade of this century to advocate the political, legal and economic rights of Black Americans.

The NAACP has served, through the Special Contribution Fund, as counsel for plaintiffs in numerous voting

rights cases including, most recently, challenges to allegedly discriminato y reapportionment schemes in South Carolina, Florida, Indiana and Yonkers, New York. The NAACP has shown through both legal advocacy and legislative efforts a substantial and ongoing interest in the enforcement of the Voting Rights Act and the Fourteenth Amendment.

The American Jewish Committee (hereinafter "AJC"), founded in 1906, is likewise a national organization, concerned with the recognition and preservation of the constitutional rights of Jewish Americans, through the protection of the rights of all Americans. The AJC believes and advocates that the welfare of Jewish Americans is inseparably linked to the existence and extension of equal opportunity to all Americans and has consistently opposed impediments to the right to vote.

The Amici have fought consistently for equal protection of the law for all, regardless of race, color, creed or national origin, and have opposed racial discrimination, an obstacle to the fulfillment of such ideals. Amici are deeply concerned that such discrimination be prevented even where masked behind facially neutral statutory provisions, particularly where these have been deliberately framed for racially discriminatory purposes, as here.

Amici believe that affirmance by this Court in this case is necessary to vindicate and forward the purposes of the Fourteenth Amendment and the Voting Rights Act.

Consent of the Parties

Counsel for appellees consent to the filing of this brief by Amici. Counsel for appellants refused to consent to the filing of this brief. Accordingly, Amici file herewith a Motion for Leave to File Amici Curiae Brief.

Statement of Interest

The NAACP, as the nation's premier champion of the rights of Black Americans, and the AJC, a leading proponent of equal protection for all, each representing its numerous branches and chapters throughout the United States, feel compelled to file this Brief. The Eleventh Circuit has ruled that Alabama, by a facially neutral provision of its State Constitution, intended to exclude Black Americans on the basis of their race from the exercise of the voting franchise. Alabama now defends its constitutional provision by reference to an equally impermissible purpose: the desire to exclude poor whites from voting. This Court should affirm the Eleventh Circuit, clearly demonstrating that racial discrimination or class discrimination are impermissible purposes in State regulation of the electoral process.

While Amici recognize that the instant case may not directly impact thousands of persons, both believe that the principle involved—the impermissibility of state action to disenfranchise black Americans or poor whites because of fear as to how either group might vote—is of critical importance.

Statement of the Case

We adopt the statement of the case presented by appellees, Underwood, et al.

Summary of Argument

Alabama concedes that section 182 was enacted with a discriminatory purpose: to disenfranchise blacks and "poor whites." Alabama contends that the Court of Appeals improperly held that the State violated the Fourteenth Amendment. Alabama is wrong. The Court of Appeals properly concluded that the challenged constitutional pro-

vision was enacted for racially discriminatory purposes. On this basi alone, the Court of Appeals decision should be upheld.

That the State may have *in addition* sought to disenfranchise poor whites, even if true, does not save section 182 for the record clearly demonstrates that section 182 would not have been enacted absent the racially discriminatory motivation. In any event, enactment of the provision for the purpose of disenfranchising poor whites would invalidate section 182 as that purpose as well is unconstitutional, impermissible and illicit.

Prior decisions of this court have clearly held that fencing out a political group from the electoral process violates the equal protection clause. Alabama admits that this was the explicit intent of its framers. Accordingly, the Eleventh Circuit decision must be affirmed.

Contrary to the miscitations in appellants' brief, the Tenth Amendment does not give states *carte blanche* authority to violate the equal protection clause in the regulation of state or local elections. Likewise, section 2 of the Fourteenth Amendment does not expressly or by indirection support the authority of a State to deny the franchise to misdemeanants, particularly where such action was concededly motivated primarily by a desire to exclude racial and political groups from the political process and not by the desire to proclaim a state policy against voting by persons convicted of crimes of moral turpitude. The Eleventh Circuit correctly found that this latter justification did not inform the challenged constitutional section. Rather, it is a *post hoc* rationalization for action taken specifically and intentionally, as Alabama concedes, to disenfranchise racial and political elements judged to be a threat to the prevailing majority.

ARGUMENT

I.

The Court of Appeals Properly Concluded That the Challenged Constitutional Provision Was Enacted for Discriminatory Purposes and the Appellants Concede as Much.

This appeal follows a decision by the Court of Appeals for the Eleventh Circuit reversing a district court opinion which had found that the Alabama constitutional provision in question—section 182 of the 1901 Constitution—was not adopted for racially discriminatory purposes. The Court of Appeals held that ample record evidence supported appellees' claim that the 1901 Constitutional Convention enacted the challenged provision as one component of a broader legislative scheme meant to disenfranchise blacks. (A-8-12). While not the only element of this scheme, the Court of Appeals found that the challenged enactment was intended to and has played a substantial role in ensuring that blacks, otherwise qualified, do not effectively participate in the political process.

Appellants only weakly challenge this specific conclusion of the Court of Appeals. On pages 11-12 of its Brief, Alabama rather confusedly addresses the issue of whether racial motivation informed the passage of the challenged provision. Admitting, as it must, that racial animus was expressed at the State Constitutional Convention (A-6-9), Alabama submits that this theme—"to disenfranchise blacks and not to disenfranchise any whites" [1]—should not "mislead" the courts into holding that racial animus, in fact, motivated the passage of the provision. However, Alabama's argument is entirely inconsistent and unpersuasive.

Alabama suggests that the racial animus was a "public relations ploy" intended to inflame whites into voting for

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[1] This is Alabama's summary of the history of the Constitutional convention on this issue.

the challenged provision, all the while believing they were simply disenfranchising blacks. Whites did so, Alabama now argues, without realizing that the true effect of the provision in question would disenfranchise them as well. This is certainly no argument against the Court of Appeal's conclusion that racial animus informed the passage of section 182. In fact, the State concedes as much.

On page 12 of its Brief, Alabama argues that a permissible purpose supported the passage of section 182. The purpose was to disenfranchise poor whites. However, Alabama's argument is circular. This purpose, if known, would have led to the defeat of the proposition. This provision would not have been enacted had this purpose been publicized or accepted. Indeed, Alabama concedes that this purpose was purposely concealed and whites led to believe that excluding blacks would be achieved by the provision. How Alabama can then argue that in the absence of the racially discriminatory purpose the provision would have been passed is more than mystifying. That purpose, by Alabama's own logic, was used precisely as a means of garnering public support for section 182. Accordingly, it is entirely fatuous to argue, as Alabama now does, that "this provision would have passed and the same result achieved regardless of any allegation concerning illicit motive or protected conduct." (Brief, p. 12). This assertion is fiction, for as the State previously concedes, racism was directly and intentionally used to inflame poor whites to vote for the provision. Had these same voters known that the real purpose of the provision was to disenfranchise *them* for political reasons, Alabama's current suggestion, they would have disfavored the provision, leading to its demise.

Nor has Alabama contested the proof of disparate impact upon which appellees have relief.

In light of the proof that Alabama was motivated at least in substantial part by a racially discriminatory pur-

pose and that section 182 has had a racially disparate effect upon blacks, the Court of Appeals properly shifted to Alabama the burden of showing that the provision was enacted to serve a substantial and legitimate state interest. Appellants, in response, contend that the challenged ordinance furthers a permissible state interest—disqualification of persons convicted of committing crimes of moral turpitude from electoral affairs.

However, in support of this argument, Alabama cites no excerpt from the 1901 Constitutional Convention which shows that the disqualification of those convicted of crimes manifesting moral turpitude was *actually* a legislative goal. A-12, *Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632, 641, n. 9, *See*, Tribe, *American Constitutional Law*, pp. 594-598; 602; 1082-1088. In rejecting this argument, the Eleventh Circuit found that Alabama enacted the challenged provision to exclude blacks from the political process through a package of techniques which Constitutional Convention delegates believed would effectuate this goal. The delegates did not seek to declare as state policy that those convicted of crimes of moral turpitude could no longer vote. Had the latter purpose informed the Constitutional Convention, the Court of Appeals reasoned, the list of offenses conviction of which would trigger disenfranchisement would have been more inclusive. *Village of Arlington Heights* v. *M.H.D.C.*, 429 U.S. 252, 270, n. 21 (1976). As the Court of Appeals held, the means employed in a case alleging restrictions on the voting franchise must be precisely drawn to accomplish compelling purposes. *Kramer* v. *Union Free School District*, 395 U.S. 631 (1969). Finally, the State does not contest the Circuit Court's finding that the list of offenses conviction of which triggered disenfranchisement was tailored to include those offenses for which blacks were disproportionately convicted. Again, the Eleventh Circuit found, as a matter of fact, that this tailoring process was calculated to ensure the maximum exclusionary impact possible upon prospective black voters. A-10-11.

This court has long since settled upon an approach to the Fourteenth Amendment appropriate for this case. The Court of Appeals correctly applied this approach. First, following settled principles, it recognized that voting is a fundamental right and interest of citizenship. *Reynolds* v. *Sims,* 377 U.S. 533 (1964). Second, it found, correctly, that the challenged provision infringes upon the right to vote, indeed, by its terms, deprives certain persons of that right. Third, it found that this infringement was intended to and did adversely and disproportionately deprive blacks of the franchise. (A-13-14). These propositions fully support the Court of Appeals' conclusion that, unless Alabama could show (a) that a compelling state interest motivated the passage of the provision and (b) that this interest almost certainly would have led to the passage of the provision absent racially discriminatory motivation and racially disproportionate effect, *Mt. Healthy City School District Board of Education* v. *Doyle,* 429 U.S. 274 (1972), its enactment was unconstitutional.

The Eleventh Circuit next examined the reasons profferred at trial by the State for the enactment of section 182. The court found that Alabama itself had not characterized any of these reasons as "compelling" and had failed to show that any were so considered in 1901. Finally, the court found that since the provision was part of a broader effort to disenfranchise blacks, it would not have been adopted absent this discriminatory intent or if it was believed not likely to have such an effect.

In short, applying the proper Fourteenth Amendment analysis, the Court of Appeals found the provision racially discriminatory in intent and effect and lacking any compelling basis, either in 1901, the time of enactment, or in 1984. In this context, the Court of Appeals did not reach the issue of whether, in the presence of a compelling interest, the Constitutional Convention chose the least restrictive means, most respecting the importance of the right at stake. *Kramer, supra.*

II.

The Court Should Reject the Arguments Advanced by Alabama in Defense of Section 182.

Alabama urges this Court to reverse the decision of the Eleventh Circuit. In support of this plea, it makes three unconvincing and ill-grounded arguments. First, it maintains that the Tenth Amendment insulates the States from federal court challenges to locally established terms and conditions for the exercise of the franchise. Second, citing *Richardson* v. *Ramirez,* 418 U.S. 24 (1974), appellants assert an absolute and constitutionally-recognized right to prohibit misdemeanants from voting. Third, Alabama argues that a permissible purpose—the desire to disenfranchise poor whites—motivated enactment of the challenged provision and that, with this motive, the Constitutional Convention would have enacted section 182 absent its racial motivation and effect.

For the reasons explained below, none of these arguments is sound and the decision below should be affirmed.

A. *The Tenth Amendment Does Not Give States Authority to Burden the Right to Vote in a Racially Discriminatory Manner.*

Alabama cites several cases for the proposition that the Tenth Amendment delegates to States the authority to establish the terms and conditions for participation in state and local elections. However, Alabama chooses to ignore the fact that this Court has clearly recognized that the Civil War Amendments limit the States' authority to regulate electoral participation. Accordingly, where the taint of racial discrimination is shown to have motivated state regulation of the franchise, this Court has strictly scrutinized the challenged provision. Contrary to Alabama's rather bold assertion that the "United States Constitution leaves unequivocally to the States the right to administer

the electoral process and to set qualifications and conditions upon the exercise of the franchise", in each case Alabama cites, this Court has articulated the clear limits of this state authority.

For instance, in *Kusper* v. *Pontikes,* 414 U.S. 51 (1973), cited by Alabama to support its claim that the Constitution unequivocally grants authority over local election regulation to the States, this Court affirmed a three-judge court's judgment that an Illinois statute requiring a twenty-three month period between a voter's participation in the primaries of the two major political parties was an unconstitutional abridgment of the right to associate. Relying upon *Dunn* v. *Blumstein,* 405 U.S. 330 (1972), the Court held that states may not infringe upon basic constitutional rights in governing access to the political process. Contravening this basic principle, Illinois' enactment created a substantial restraint upon the voter's right to associate with a political party of his choice and to influence the affairs of that party. This was impermissible notwithstanding the Tenth Amendment's grant to the States of authority to regulate local elections.

Kusper is a particularly strong example of this Court recognizing the primacy of federally-protected rights over the Tenth Amendment interests of states because this Court recognized as legitimate the state interest Illinois sought to advance by its challenged enactment: limiting one political party's ability to "raid" the other party. Notwithstanding this "legitimate" interest, the Court found the state enactment unconstitutional: the state interest was insufficient in importance to justify the significant encroachment which the challenged statute worked upon associational freedom, a right recognized by the First Amendment. *Bates* v. *Little Rock,* 361 U.S. 516, 524 (1960).[2]

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[2] The instant case presents no "legitimate", let alone compelling, state interest. While *Kusper* arguably required this Court to bal-

(footnote continued on following page)

Kusper contradicts, rather than supports, appellants' assertion that States have an unequivocal right to supervise and control their elections.

Alabama next cites *Lassiter* v. *Northampton Board of Elections*, 360 U.S. 45 (1959) for this Court's allegedly "sweeping and persuasive comments concerning the power of a state to control their own elections." Again, *Lassiter* fails to support the proposition for which it is cited. In *Lassiter*, for a unanimous Court, Justice Douglas upheld North Carolina's literacy test as a facially neutral device by which the State judged voter suitability. Critically, the Court expressly limited its support of the literacy test to the issue of facial neutrality. As Justice Douglas noted, the Fifteenth Amendment would be violated by a state practice which gave whites preferential treatment at the polls, "But this issue of discrimination in the actual operation of the ballot laws of North Carolina has not been framed in the issues presented for the State court litigation . . . So we do not reach it." *Id.* at 50.

Lassiter clearly recognized the limits of the State's authority to regulate elections, "The States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised . . . absent of course the discrimination which the Constitution condemns." *Id.* Alabama fails to mention such limitations in its description of the States' regulatory authority, choosing, instead, to overstate the Tenth Amendment's primacy

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(footnote continued from previous page)

ance the legitimate interest forwarded by the challenged exercise of the State's Tenth Amendment regulatory authority, our case requires no such balancing for, as the Court of Appeals found, no legitimate, consistently forwarded, racially-neutral purpose is or has been advanced by Section 182.

Kusper also supports the appropriateness of the Fourteenth Amendment analysis elaborated in Part I of this Brief. Illinois failed, for instance, to show that the means it employed least restricted the constitutionally protected liberty. *Dunn* v. *Blumstein, supra.*

as against constitutional protections like the ones involved in the instant case. But, Justice Douglas clearly described the framework in which the States' authority may be exercised, " . . . while the right of suffrage is established and granted by the Constitution . . ., it is subject to the imposition of state standards *which are not discriminatory and which do not contravene any restriction that Congress, acting pursuant to its constitutional powers, has imposed.*" *Id.* at 50-51 (emphasis added).

In deciding *Lassiter,* this Court was careful to distinguish the case before it from future cases which might (a) challenge as racially discriminatory the actual practice of a state which employed literacy tests or (b) allege that such tests were enacted to disenfranchise blacks. Specifically, Justice Douglas distinguished the facts in *Lassiter* from those in *Davis* v. *Schnell,* 81 F. Supp. 872, aff'd 336 U.S. 933, where a three-judge court held unconstitutional a literacy test which required citizens to "understand and explain" an article of the federal constitution. In that case, Justice Douglas wrote, "The legislative setting of that provision and the great discretion it vested in the registrars made clear that a literacy requirement was merely a device to make racial discrimination easy." *Lassiter, supra* at 53-54.

Lassiter, then, offers no support for a State like Alabama which is herein challenged for enacting with racial animus in its "legislative setting" a constitutional provision. To the contrary, *Lassiter* supports the appropriateness of federal judicial review in such instances to insure that the protections of the Fourteenth and Fifteenth Amendments are not trammelled by State provisions enacted with racial animus.

Finally, *Oregon* v. *Mitchell,* 400 U.S. 112 (1970), provides no support, as Alabama claims, for the sweeping proposition that States have unbridled authority to regulate enfranchisement in state and local elections. In

Oregon, supra, while limiting Congress' authority to establish conditions for the exercise of the franchise in state, as opposed to federal elections, the Court again recognized that the Fourteenth and Fifteenth Amendments limit state authority in this area. *Id.* at 124-125. As Justice Black explained, "the framers of the Civil War Amendments intended[ed] to deny to the states the power to discriminate against persons on account of their race." *Id.* at 126.

Indeed, the very analysis which established the impermissibility of Congress' attempt to enfranchise 18 year olds in all (including state and local) elections underscores the limitations placed on the States (and the Tenth Amendment) by the Civil War Amendments. In declaring that Congress had overreached its constitutional authority, Justice Black expressly considered whether, in extending the franchise to 18 year olds in state and local elections, Congress had sought to rectify a racially-based inequity, i.e., were those persons aged 18-21 disenfranchised by the States due to their race and was Congress acting to rectify such discrimination? Justice Black answered those questions negatively:

> In enacting the 18 year old vote provision . . ., Congress made no legislative findings that the 21 year old vote requirement was used by the States to disenfranchise voters on account of race. I seriously doubt that such a finding, if made, could be supported by substantial evidence. *Since Congress has attempted to invade an area preserved to the States by the Constitution without a foundation for enforcing the Civil Rights Amendments' ban on racial discrimination, I would hold that Congress has exceeded its power in attempting to lower the voting age in state and local elections . . .*

Id. at 130 (emphasis added).

Again, *Oregon* v. *Mitchell, supra,* particularly the language cited, supports appellees' position that the Fourteenth and Fifteenth Amendments limit the States' au-

thority to condition the exercise of the franchise. And, the cases make equally clear that enactments which intentionally disenfranchise or have that effect upon black voters are constitutionally infirm.

In short, this Court should reject Alabama's first argument: the States, as this Court has consistently held, do not have unbridled and unequivocal authority to condition the electoral franchise in state and local elections. The Civil War Amendments limit this authority. And, in the instant case, the appropriate application of settled Fourteenth Amendment analysis led the Court of Appeals to rule section 182 unconstitutional. The decisions cited by Alabama clearly recognize the limitations on State power and authority. And, instructively for *Hunter,* each draws such limits directly from the Civil Rights Amendments, upon which the Court of Appeals relied below.

B. *Section 2 of the Fourteenth Amendment Does Not Expressly or by Indirection Support the State's Authority to Deny the Franchise to Misdemeanants, Particularly Where Such Action Was Motivated Primarily by Racial Animus and Not by the Desire to Proclaim State Policy Against Crimes of Moral Turpitude.*

As Justice Marshall predicted in his dissent in *Richardson* v. *Ramirez,* 418 U.S. 24, 83 (1974), Alabama next argues that that case supports a state's denial of the ballot to persons convicted of selected misdemeanors. In support of this contention, Alabama misstates the precedent and takes out of context the arguments made in Congress in support of section 2 of the Fourteenth Amendment. Indeed, as is demonstrated below, those supporting Section 2 were deeply committed to insuring that States readmitted to the Union *not* discriminate against blacks in the arena of voting, a commitment precisely contrary to Alabama's position here.

In *Richardson, supra,* this Court overturned a decision by the California Supreme Court which had declared un-

constitutional under the federal equal protection clause a state statute prohibiting felons from ever again voting. In *Richardson*, respondents had argued that no compelling state interest supported California's denial of the right to vote to felons who had served their debt to society and now sought to re-enter it. *Id.* at 27. In response, this Court reviewed the history of Section 2 of the Fourteenth Amendment which, California urged, expressly permitted states to disenfranchise those convicted of felonies. For the Court, Justice Rehnquist agreed with California, finding that Section 2 meant exactly what it said, allowing the very prohibition declared unconstitutional by the California Supreme Court.

Alabama cites *Richardson* as support for its state constitutional provision which disenfranchises misdemeanants. But a careful review of the same legislative history cited by Justice Rehnquist demonstrates that Congress intended to permit states to disenfranchise felons, not misdemeanants. And, *Richardson* turns on this specific legislative history, not upon some broader grant of authority to the States.

First, as this Court held in *Richardson*, section 2 applies only to *felonies*. In interpreting the meaning of the term "crimes," as used in Section 2, Justice Rehnquist cited the comments of Representative Ephraim Eckley (Ohio) who referred in his elaboration of "crimes" *only to felonies*. *Id.* at 46. Justice Rehnquist also notes in support of the conclusion that Section 2 allowed states to continue to disenfranchise felons evidence that 29 states did so in 1866, the year the Fourteenth Amendment was enacted. *Id.* at 47. The Court also observed that many of the Re-admission Acts, which set conditions on rebel states re-joining the Union, required States to prohibit from voting those who had participated in the rebellion (the Civil War) and those who had been convicted of *felonies* at common law. *Id.* at 48-49. This legislative history does *not* support Alabama's argument that Section 2 of the Fourteenth Amendment contemplates or approves of the state practice of prohibiting misdemeanants from voting.

Other parts of the legislative history show, even more strongly, that allowing Section 2 to protect a Constitutional provision passed with the expressed intent to discriminate against black voters would turn that section and the related Re-Admission statutes on their heads. For instance, Senator Henderson (Missouri), also cited by Justice Rehnquist in *Richardson*, made clear that to be readmitted to the Union, rebel states had to adopt universal suffrage "except for treasons of such crimes as were felonies at the common law, the regulation of exclusion to be left to the States themselves." *Id.* at 49.

Arkansas was re-admitted to the Union on June 22, 1868 under the terms of a State which required universal sufferage, but allowed exclusion for those who had committed "felonies at common law, where they (those excluded) should have been duly convicted, *under laws equally applicable to all the inhabitants of the state.*" Id. at 51 (emphasis added). Such language was included in Re-Admission statutes specifically to insure that Blacks were given equal access to the franchise as whites, not abused or denied the right to vote in former rebel states. *Id.* at 52. *See,* Comments of Senator Drake of Missouri, *Cong. Globe,* 40th Cong., 2d Session 2600 (1868).

As this recitation shows, Section 2 of the Fourteenth Amendment was not meant as a vehicle for allowing states to enact racially discriminatory restrictions on the electoral participation of blacks. Any state statute enacted pursuant to Section 2 had to treat all persons equally, regardless of race, and, by definition, any provision, such as Section 182, passed with the intent to discriminate against blacks, fails this standard.

Moreover, at the time it enacted Section 2, Congress was aware that States might attempt to selectively extend or deny altogether the franchise to Negroes. The legislative history cited in *Richardson* shows (a) that Congress readmitted rebel states with the understanding that they

would not allow rebels or persons convicted of felonies to vote but (b) that Congress was also concerned that, in defining felonies conviction of which would trigger disenfranchisement, states not use standards or tests which discriminate against blacks, denying them the right to suffrage.

As Justice Rehnquist held in *Richardson,* ". . . we may rest on the demonstrably sound proposition that section 2, in dealing with voting rights as it does, could not have meant to bar outright a form of disenfranchisement which was expressly exempted from the less drastic sanction of reduced representation which section 2 imposed for other forms of disenfranchisement." *Id.* at 55. The arguments adduced in support of this holding are unavailable in support of section 182 which denies the franchise to those convicted of certain, select misdemeanors, chosen, as the Court of Appeals found below, because of their disproportionate incidence among blacks, not because of the inherent qualities of persons associated with these misdemeanors, as opposed to others convicted of misdemeanors for which disenfranchisement did not follow.

Alabama argues that, regardless of its intent, it had authority under Section 2 to disenfranchise misdemeanants. It suggests that even if it selectively disenfranchised misdemeanants, using race as the basis for inclusion of one and exclusion of others, this would be permissible. Section 2 of the Fourteenth Amendment does not so tolerate and *Richardson* cannot be so stretched.

C. *Disenfranchising Poor Whites Is Not a Permissible Basis for Upholding Section 182.*

The Court of Appeals found that Alabama had articulated no permissible basis in support of the adoption of section 182. A state, it reasoned, may not years later invent a justification for an enactment. Instead, the State must adduce evidence of the contemporary (1901) articulation of and reliance upon such an allegedly race-neutral purpose to rebut proof that same was enacted for dis-

criminatory purposes. *Cleveland Board of Education* v. *La Fleur, supra.*

In this instance, Alabama has failed to show that any permissible, let alone compelling, basis prompted the enactment of the challenged constitutional provision. In response to the State's argument that it passed section 182 to deny those convicted of violating the law of the franchise, the Court of Appeals responded, "we are unable to discern any evidence that the rule was actually intended to serve that interest." (A-12).

In rejecting the State's argument, the Circuit Court noted (a) there were several "glaring omissions" from the non-prison offenses resulting in disenfranchisement under Section 182; (b) such omissions call into question whether the "good government" purpose cited by appellants was an afterthought or a motivating principle and (c) the Constitutional Convention proceedings are bereft of any reference to or evidence of a "good government" purpose. The Court of Appeals concluded that the appellants had presented "no evidence" from which the district court could find that Section 182 would have been adopted had a permissible purpose motivated the enactment. (A-13).

The State now asserts that it had a compelling interest in disenfranchising those who had been convicted of misdemeanors involving moral turpitude, regardless of the length of punishment for the commission of said crimes. But, this argument fails because Alabama has still not shown that this purpose in fact motivated the delegates to the 1901 Constitutional convention. Instead, the record evidence supports the Court of Appeals' conclusion that racial discrimination, not the desire to punish those guilty of moral turpitude, motivated the convention. Nor has Alabama suggested the principle of selection which led its authorities to consider certain crimes as exhibiting moral turpitude and others, seemingly similar in seriousness, as not. In the absence of any alternative explana-

tion by appellants, the Eleventh Circuit concluded that the operative principle of selection was the delegates' observation of the incidence by race of the various offenses. This is clearly not a permissible basis for determining who can vote!

Offering no counter-evidence with regard to the principle of selection used to select those misdemeanors conviction of which would trigger disenfranchisement, Alabama instead cites *Kronlund* v. *Honstein*, 327 F. Supp. 71 (N.D. Ga. 1971) for the permissibility of a state statute disqualifying felons from voting. But this case does not further Alabama's argument. *Kronlund* did not address the issues of (a) the selective disenfranchisement of persons on account of race; (b) the intentional enactment of a provision to disenfranchise based on race or (c) the permissibility of a state provision which, while facially neutral, has disproportionately exclusionary impact on blacks. Indeed, *Kronlund* decided no race-related issues at all, merely upholding Georgia's capacity to disallow felons from voting. The language cited by appellants from *Kronland* is dicta, having nothing to do, in any event, with the facts of the instant case.

Finally, Alabama suggests that Section 182 was passed for political reasons, to disenfranchise poor whites and blacks. Accordingly, the State asserts that the provision would have been enacted absent discriminatory intent. This argument fails both as unsupported below and as an admission by the State of yet another unconstitutional purpose.

First, the purpose of disenfranchising poor whites, even if present, is certainly not compelling. Such a reason, even if true, cannot save an enactment admittedly passed as well specifically to exclude blacks from voting. Conceding that discrimination against blacks as blacks was present, the State must adduce a non-racial, neutral, governmentally-appropriate basis for the challenged provision, not admit

to another illicit, unconstitutional purpose, such as class-based or politically motivated discrimination.[3]

Second, the political basis for the provision's enactment is inseparably linked to racial discrimination, not the sort of independent neutral reason which might justify a carefully-tailored restriction of a fundamental right. As the Eleventh Circuit concluded, the legislature wanted to disenfranchise blacks because of their assumed political loyalties, an obvious infringement not only upon the right to vote, but the First Amendment as well. Such a reason is hardly neutral or non-racial.

CONCLUSION

In conclusion, the Eleventh Circuit properly analyzed the facts and controlling law in this case and its decision should be affirmed.

Respectfully submitted,

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[3] *Richardson* v. *Ramirez*, *supra*, at 82 (Marshall dissenting); *Carrington* v. *Rash*, 380 U.S. 89, 94 ("'Fencing out' from the franchise a sector of the vote population because of the way they may vote is constitutionally impermissible. 'The exercise of rights so vital to the maintenance of democratic institutions,' *Schneider* v. *Stark*, 308 U.S. 147 (1939) cannot constitutionally be obliterated because of a fear of the political view of a particular group of *bona fide* residents.") Alabama admits to this unconstitutional, content-based deprivation of the rights of "poor whites" to vote. This is patently unconstitutional. *Also see*, *Karcher* v. *Daggett*, 103 S. Ct. 2653 (1983); *Daggett* v. *Kimmelman*, 580 F. Supp. 1259 (D. N.J. 1984).

No. 84-76

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Appellants,

v.

VICTOR UNDERWOOD and CARMEN EDWARDS, for themselves and all others similarly situated,

Appellees.

APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF OF *AMICUS CURIAE* NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. IN SUPPORT OF APPELLEES

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No. 84-76

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

NELL HUNTER, et al. INDIVIDUALLY,
AND ON BEHALF OF ALL OTHER MEMBERS
OF BOARD OF REGISTRARS
IN THE STATE OF ALABAMA,

Appellants,

VICTOR UNDERWOOD AND CARMEN EDWARDS,
FOR THEMSELVES AND ALL OTHERS SIMILARLY
SITUATED,

Appellees.

APPEAL FROM THE UNITED STATES COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF AMICUS CURIAE NAACP LEGAL DEFENSE
AND EDUCATIONAL FUND, INC.

STATEMENT OF INTEREST OF AMICUS CURIAE

The NAACP Legal Defense and Educational Fund, Inc. is a non-profit corporation which was established for the purpose

of assisting black citizens in securing their civil rights. It has been cited by this Court as having "a corporate reputation for expertness in presenting and arguing the difficult questions of law that frequently arise in civil rights litigation." NAACP v. Button, 371 U.S. 415, 422 (1963). The Legal Defense Fund has appeared before this Court on numerous occasions representing parties or as amicus curiae in cases raising constitutional and statutory issues concerning the right to vote.[1]

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[1] See e.g., Rogers v. Lodge, 458 U.S. 613 (1982) (amicus curiae); City of Mobile v. Bolden, 446 U.S. 55 (1980); United Jewish Organizations v. Carey, 430 U.S. 144 (1977); East Carroll Parish School Bd. v. Marshall, 424 U.S. 636 (1976); Allen v. State Board of Elections, 393 U.S. 544 (1969); Anderson v. Martin, 375 U.S. 399 (1964); Smith v. Allwright, 321 U.S. 649 (1944).

This case presents intertwined questions involving the grounds for disenfranchisement of voters and the proof and significance of racially invidious intent. The Legal Defense Fund is actively involved in challenging State standards, practices and procedures which abridge the right to vote. These State restrictions fall with greatest weight on blacks, other minorities, and the poor. The Court's resolution of the issues presented by this case may materially affect the ability of amicus to advance its program of vindicating the right to vote.

Letters consenting to the filing of this brief by both parties are being lodged with the Clerk of Court.

SUMMARY OF ARGUMENT

The issues raised by this case go to the heart of American democracy -- the right to vote, and the right to be free from invidious racial discrimination.

The right of suffrage, the right which is "preservative of all rights," Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886), is the cornerstone of the American political system. A state's denial of the right to vote to any member of the community may be sustained as constitutional only if it is narrowly tailored to promote a compelling state purpose.

The clause of Section 182 of the Alabama Constitution of 1901 which the court below declared violative of the United States Constitution is precisely the type of State restriction of the franchise which this Court has stated must receive "close and exacting examination."

Kramer v. Union Free School Dist. No. 15, 395 U.S. 621, 626 (1969). The clause completely denies the right to vote to otherwise eligible citizens of Alabama convicted of crimes not punishable by imprisonment in the penitentiary -- e.g., misdemeanors -- involving "moral turpitude." Such a denial of the right to vote may be sustained only if it is necessary to promote a compelling State purpose.

It is at the point of inquiry into the State's purpose, however, that the denial of the right to vote becomes joined with an even uglier affront to American democracy -- invidious racial discrimination. The United States Court of Appeals for the Eleventh Circuit found, and the historical record fully supports this finding, that the clause was adopted for racially invidious reasons, as part of a broad and thoroughgoing program of white

Alabamians to disenfranchise blacks.

Appellants, however, argue that the clause may be sustained because it was adopted as an element of a disfranchisement scheme aimed as well at "populists" or "poor whites," not just blacks. This argument, even if it were a correct reading of the State's purpose, does not help their case. The denial of the right to vote on grounds of political belief or socio-economic status is as impermissible as disenfranchisement by reason of race. Like discrimination against blacks, discrimination against poor whites or Populists cannot be a compelling state interest.

Appellants remaining arguments are no more than makeweights. While this Court has held that the disenfranchisement of felons does not, in and of itself, violate the Equal Protection Clause of the

Fourteenth Amendment, Richardson v. Ramirez, 418 U.S. 24 (1974), this case does not involve the disenfranchisement for commission of a crime simpliciter. Rather, this case turns on a disenfranchisement clause adopted for constitutionally proscribed reasons -- either invidious racial animus as appellees allege and the Eleventh Circuit found, or political and wealth-based discrimination as appellants contend. Richardson v. Ramirez can provide no shelter for a measure which was intended to deny the franchise to a group of voters because of the color of their skin, their lack of assets, or their political beliefs. Nor does the Tenth Amendment provide a shield for a denial of the franchise in violation of the Equal Protection Clause of the Fourteenth Amendment.

Finally, the clause in question violates section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973(a). As amended in 1982, section 2 bars the use of voter qualifications which result in a denial of the right to vote on account of race or color. Even if the adoption of the clause is held not to have been the product of invidious racial intent in violation of the Fourteenth Amendment, it surely results in a denial of the right to vote on account of race or color.

I. VOTING IS A FUNDAMENTAL RIGHT WHICH MAY NOT BE DENIED UNLESS NECESSARY TO PROMOTE A COMPELLING STATE PURPOSE.

The Court has frequently emphasized the central role played by the right to vote in the American system of constitutional government. The right to vote "is of the essence of a democratic society, and any restrictions on that right strike

at the heart of representative government." Reynolds v. Sims, 377 U.S. 533, 555 (1964). "No right is more precious.... Other rights, even the most basic, are illusory if the right to vote is undermined." Wesberry v. Sanders, 376 U.S. 1, 17 (1964). See also Evans v. Cornman, 398 U.S. 419, 422 (1970).

In order to secure fully our system of democratic self-government, state restrictions on the right to vote have often been found constitutionally invalid upon close examination. The right to vote may not be taxed, Harper v. Virginia Board of Elections, 383 U.S. 663 (1966); one person's vote may not be given less weight than any other person's, e.g., Reynolds v. Sims; Wesberry v. Sanders; and the State may not unduly restrict the ability of new parties or independent candidates to obtain positions on the

ballot. See, e.g., Anderson v. Celebrezze, 460 U.S. 780 (1983); Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. 173 (1979); Williams v. Rhodes, 393 U.S. 23 (1968). Cf. Clements v. Fashing, 457 U.S. 957, 964-65 (1982).

Burdens on the right to register and cast a ballot, the heart of the constitutionally protected right to vote, are subject to strict scrutiny. "[I]f a challenged state statute grants the right to vote to some bona fide residents of requisite age or citizenship and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest." Kramer v. Union Free School Dist., supra., 395 U.S. at 626-27. In such a case, "the general presumption of constitutionality afforded state statutes

and the traditional approval given state classifications if the Court can conceive of a 'rational basis' for the distinctions made are not applicable." Id. at 627-28. Rather, the state must show "substantial and compelling reason" for the denial of the franchise, Dunn v. Blumstein, 405 U.S. 330, 335 (1972) and must utilize the "least restrictive means" to achieve that goal. Id. at 353.

The lower federal courts have recently decided or are currently considering dozens of cases challenging state-imposed barriers to voting under the First and Fourteenth Amendments.[2] The

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[2] The courts have recognized that state administrative practices, such as limitations on voter registration to inconvenient times and locations, or discrimination in the appointment of voter registrars on grounds of race or political affiliation, can effectively abridge the ability of citizens to register, and therefore implicate the right to vote. See, e.g., United States v. Marengo Co. Comm'n, 731 F. 2d 1546, 1569-70 (11th Cir.

ramifications of the arguments made in this case go well beyond the narrow issue of denying the franchise to certain misdemeanants.

For example, in Connecticut Citizen Action Group v. Pugliese, No. 84-431 (WWE) (D. Conn. Sept. 25, 1984), stay den'd, ___ F.2d ___ (2d Cir. Oct. 2, 1984), the Court ordered the appointment of thirty special assistant registrars to conduct registration door-to-door and at various sites in the community. That case involves the claim that holding registration at only one location in the city of Waterbury, Connecticut violates the First and Fourteenth Amendments.

1984); Rhode Island Minority Caucus, Inc. v. Baronian, 590 F. 2d 372 (1st Cir. 1979).

In Rhode Island Minority Caucus, Inc. v. Baronian, 590 F.2d 372 (1st Cir. 1979), the Court held that allowing registration drives to be conducted only by members of the League of Women Voters is unconstitu tional if racial animus played a part in the decision. Several courts have enjoined state and local refusals to permit registration forms to be distributed in public agency waiting rooms. E.g., Project Vote! v. Ohio Bureau of Employment Services, 578 F. Supp. 7 (S.D. Ohio 1982).

Other cases challenging barriers to voting are pending. In Georgia, for example, citizens in many counties must travel distances of 60 miles or more in order to register at county courthouses which are open only during normal business hours -- when most citizens are at work. The difficulty in registering is com-

pounded by the fact that the state has no rural public transportation. The failure to permit registration at satellite locations and during evening and weekend hours is currently being challenged in the case of Voter Education Project v. Cleland, No. 84-1181A (N.D. Ga.). Similar registration barriers are at issue in cases in Louisiana, Michigan, Arkansas, Missouri, and Mississippi.

The devastating effect of such barriers to registration was recently documented by a congressional subcommittee. After the Voting Rights Act: Registration Barriers, Report of the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 98th Cong., 1st Sess. (October 1984). The subcommittee concluded:

A number of states limit registration to a single central location in a county, usually the county courthouse. ...

Many registration offices are open only on weekdays and during normal business hours. Many offices are closed during lunch hours. In Virginia, most registration offices only have regularly scheduled office hours between 8 am-5 pm. Over half are not open 5 days a week, and one quarter are only open one or two days a week. These limited hours conflict with the working hours of most people. Thus, working people must take time off from work in order to register.

... Courthouses are rarely located in the minority community, so minority citizens are required to go to an unfamiliar part of town to register.... [I]n rural areas, the long distances to the courthouse coupled with the lack of public transportation turns getting to the courthouse into a Herculean effort.

Third is the problem of intimidation. In Johnson County, Georgia, the white sheriff makes a point of stationing himself outside of the door of the voter registration office in the courthouse when blacks come to register ...

... In Shenandoah County, Virginia, the registrar's office is located in the basement of the county jail.

> In Waterbury, Connecticut ... the registrar refuses to deputize any volunteers. In other places, deputization is done selectively. In Worcester, Massachusetts, the registrar does not deputize volunteers from the poor side of town ....
>
> The technicalities of the form also raise barriers. In New York, signatures are required on both sides of the form, otherwise the registration is invalid. Other states require the form to be notarized. This requires the registrant to find a notary public, and usually involves a fee for the service. In effect, this may work as an illegal poll tax.
>
> Dual registration is yet another barrier to full electoral participation. This requires citizens to register separately for both city and county elections....
>
> Purge laws, while not facially objectionable, may operate unfairly. Seven states purge voters without individual notice. In Alabama, selected counties with a higher percentage of black voters have been purged. Subcommittee Report at 4-10.

Acceptance of appellant's argument that the states have absolute, unreviewable control over voting requirements and

qualifications would permit the continued existence of several barriers and obstacles to voting, such as those described above. Yet, these modern-day versions of the poll tax are no more constitutionally acceptable than their historic predecessors. Preservation of the precious right to vote requires that all barriers to voting be subjected to strict constitutional scrutiny and permitted only when justified by compelling governmental interests.

In this case, appellants have failed to offer any compelling state interest which could justify the denial of the franchise effected by the challenged clause of Section 182. On either appellants' or appellees' theory of the purposes of the framers of the Alabama Constitution of 1901, the clause was

adopted for a constitutionally proscribed reason and not to serve a compelling state interest.

II. THE MISDEMEANANTS DISENFRANCHISEMENT CLAUSE WAS ADOPTED FOR INVIDIOUS RACIALLY DISCRIMINATORY REASONS IN VIOLATION OF THE FOURTEENTH AMENDMENT

The Court of Appeals found that the misdemeanants disenfranchisement clause of Section 182 of the Alabama Constitution was adopted with the intent, and has had the effect, of disenfranchising blacks. (J. S. at A-6 through A-141.) The court properly applied the test for determining discriminatory intent set forth by this Court in Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977), and its conclusion is amply supported by the legal and historical record.

In Arlington Heights, the Court identified the factors which may be used to prove that a law, while fair on its face, was adopted for an invidiously discriminatory purpose: "The historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes." 429 U.S. at 267. "The legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports." Id. at 268. "The impact of the official action -- whether it 'bears more heavily on one race than another,'... -- may provide an important starting point. Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when

the governing legislation appears neutral on its face." Id. at 266, quoting Washington v. Davis, 426 U.S. 229, 242 (1976).

The Eleventh Circuit properly relied on each of these factors in reaching its determination that the disenfranchisement clause in this case was adopted for racially discriminatory purposes.

The "historical background" to Section 182 is clear: "[B]eginning in 1890, the States of Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Virginia enacted tests still in use which were specifically designed to prevent Negroes from voting." South Carolina v. Katzenbach, 383 U.S. 301, 310 (1966). The Alabama Constitutional Convention of 1901 "assembled largely, if not principally, for the purpose of changing the 1875 Constitution

so as to eliminate Negro voters." United States v. State of Alabama, 252 F. Supp. 95, 98 (M.D. Ala. 1966) (three-judge court). "'What they want is a scheme pure and simple which will let every white man vote and prevent any Negro from voting,' reported the Birmingham Age-Herald about the delegates at the Alabama Constitutional Convention of 1901." Schmidt, Principle and Prejudice: The Supreme Court and Race in the Progressive Era. Part 3: Black Disfranchisement from the KKK to the Grandfather Clause, 82 Colum. L. Rev. 835, 846 (1982).

The legislative history is also clear. "Delegate after delegate took the floor eager to be put on record as favoring 'the absolute disfranchisement of the Negro as a Negro'.... The Journals of the Convention leave absolutely no doubt as to what the delegates of the white

citizens of Alabama wished the Convention to accomplish: ... 'it is our intention, and here is our registered vow to disfranchise every Negro in the state...'" United States v. Alabama, supra, 252 F. Supp. at 98, quoting comments by convention delegate reported in the Official Proceedings.

In developing their program of disenfranchisement, the delegates took care to avoid the strictures of the Fourteenth and Fifteenth Amendments. Instead of directly curtailing the franchise on grounds of race, the suffrage committee "made resort to facially neutral 'tests that took advantage of differing social conditions. Disenfranchisement for commission of specified misdemeanors is in pari materia with the "grandfather clause," the poll tax, and the literacy test -- a clear pattern of measures

neutral on the surface but adopted for the purpose and having the effect of disenfranchising blacks, and which were subsequently declared invalid for that reason. See, e.g., Guinn v. United States, 238 U.S. 347 (1915) (grandfather clause), South Carolina v. Katzenbach, supra, 383 U.S. at 312, 333-34 (literacy test), United States v. State of Alabama, supra, (poll tax).

Although the clause at issue purports to utilize a racially neutral criterion -- misdemeanors involving moral turpitude -- moral turpitude was intentionally defined to bring about the disenfranchisement of blacks. The suffrage committee of the Constitutional Convention chose offenses that were believed to be peculiar to blacks' low income and social status, such as petty property offenses, and minor sex-related crimes. (J. S. at A-10,

citing P. Lewison, Race, Class and Party 81 (1963).) Appellants' own expert, Dr. Thornton, acknowledges that the disqualifying crimes were those "associated in the public mind with the behavior of blacks." Joint App. at A-23.

The brunt of the non-penitentiary offenses clause was, and still is, borne by blacks. Joint App. at A-26; J.S. at A-11. Thus, the elements of proving racally invidious discrimination identified in Arlington Heights -- historical background, legislative history, pattern of discriminatory enactments, and disparate racial impact -- are all present here.[3] Taken together they prove the

[3] Therefore, this case differs significantly from the veteran's preference upheld in Personnel Administrator of Mass. v. Feeney, 442 U.S. 256 (1979). Unlike Feeney, in which the worthy and legitimate goals behind the veteran's preference were stipulated, the classification here is neither rationally based, traditionally justified nor beneficent. Indeed,

"'insidious and pervasive evil' of racial discrimination in voting." City of Rome v. United States, 446 U.S. 156, 174 (1980). A state restriction on the right to vote adopted for racially invidious reasons violates the Equal Protection Clause of the Fourteenth Amendment, Rogers v. Lodge, 458 U.S. 613, 621-22 (1982), City of Mobile v. Bolden, 446 U.S. 55, 66-67 (1980) (plurality opinion), as well as the Fifteenth Amendment. City of Mobile, supra, Gomillion v. Lightfoot, 364 U.S. 339 (1960), Guinn v. United States, supra.

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appellants concede racial antipathy behind the misdemeanant exclusion clause, and proof of its discriminatory purpose, contrary to the plaintiff's case against the Massachusetts veteran's preference, is not solely based on inferences from its disproportionate impact.

III. DISENFRANCHISEMENT OF POOR WHITES BECAUSE OF THEIR POLITICAL BELIEFS OR LACK OF WEALTH VIOLATES THE FIRST AND FOURTEENTH AMENDMENTS

Appellants contend that the misdemeanants exclusion clause of section 182 was not adopted solely because of anti-black racial animus, but rather was adopted for "political reasons," to disenfranchise as well "poor whites" or "populists." (Brief for Appellants at 9-10, 12). Appellants' theory is problematic as an interpretation of the 1901 Alabama Constitutional Convention, but even if appellants' theory were true it could not save the disenfranchisement clause.

Appellants' theory assumes that the "racial" and "political" purposes of the Alabama Constitutional Convention were distinct. To the contrary, in turn-of-the-century Alabama and throughout the

Deep South at that time politics and race were largely intertwined. See Schmidt, Principles and Prejudices, supra, 82 Colum. L. Rev. at 842-47. Even appellants' expert Dr. Thornton, acknowledges that the Constitutional Convention delegates sought to achieve their "political," anti-Populist, goal by "eliminating the black vote that had -- the courting of which had represented the principal threat from the point of view of conservative white democrats." (Joint App. at A-19.)

Moreover, in order to find that section 182 was "political" and not "racial", the court must ignore most of the historical record. Appellants urge the Court "not to be misled by reading or analyzing the proceedings of the Convention." (Brief for Appellants at 18.) The speeches and debates of the delegates, the anti-black statements, and the avowal of

anti-black purposes were all a "public relations gesture." (Joint App. at A-23, A-27). Appellants' expert acknowledges that "[i]f you read the four volumes of the official proceedings -- a fate I wouldn't wish on anyone --but if you happen to, you will come away with the sense that race simply dominates the proceedings of the Convention." (Id. at A-27). His solution is to ignore the statements and actions of the delegates and rely solely on their unstated intentions, as he divines them. Thus would appellants have the Court ignore the approach for identifying intent set forth in Arlington Heights and pursued by the Eleventh Circuit.

Most importantly, however, appellants' version of history cannot save the misdemeanants disenfranchisement clause from invalidation. On appellants' theory

the clause is constitutional because it was adopted with the intent to discriminate against "poor whites" or "Populists." Such a contention would be laughable if it were not so offensive. The franchise may no more be denied on grounds of political belief or lack of wealth than it may be for racial animus.

"'Fencing out' from the franchise a section of the population because of the way they may vote is constitutionally impermissible. '[T]he exercise of rights so vital to the maintenance of democratic institutions,' ... cannot be obliterated because of a fear of the political views of a particular group of bona fide residents." Carrington v. Rash, 380 U.S. 89, 94 (1965) "'[D]ifferences of opinion' may not be the basis for excluding any group or person from the franchise." Dunn v. Blumstein, supra, 405 U.S. at 355, quoting

Cipriano v. City of Houma, supra, 395 U.S. at 705-06. Accord, Evans v. Cornman, 398 U.S. 419, 422 (1970). As this Court observed in another context, "Congress may not 'enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office.'" United Public Workers v. Mitchell, 330 U.S. 75, 100 (1947). These cases clearly establish that where the right to vote is at stake, political minorities as well as racial minorities -- "populists" as well as blacks -- are protected by the Equal Protection Clause. The desire to vanquish one's political opponents or "fence out" citizens holding unorthodox beliefs has never withstood strict scrutiny or been found to serve a compelling state interest to justify the denial of the franchise to the disfavored group. Indeed, a finding that section 182 was adopted out of an-

tipopulist or anti-poor white animus would compel the determination that it violates the Fourteenth Amendment.

"Wealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process. Lines drawn on the basis of wealth or property, like those of race ... are traditionally disfavored" where the franchise is at stake. Harper v. Virginia Board of Elections, 383 U.S. 663, 668 (1966). This Court has consistently held unconstitutional under the Equal Protection Clause wealth-based restrictions on the franchise, such as the poll tax, Harper, supra, excessive filing fees, Lubin v. Panish, 415 U.S. 709 (1974), Bullock v. Carter, 405 U.S. 134 (1972), and statutes restricting to taxpayers the right to vote on bond issues, Phoenix v. Kolodziejski, 399 U.S. 204 (1970), Cipri-

ano v. City of Houma, 395 U.S. 701 (1969). The right of suffrage of "poor whites" like that of blacks is protected by the Constitution and may not be denied by measures aimed at them because of their lack of wealth.

IV. RICHARDSON v. RAMIREZ DOES NOT INSULATE THE MISDEMEANANTS' DISENFRANCHISEMENT CLAUSE FROM STRICT SCRUTINY.

Appellants contend that the misdemeanants disenfranchisement provision of section 182 is insulated from Equal Protection Clause review by virtue of this Court's decision in Richardson v. Ramirez, 418 U.S. 24 (1974). In Richardson, the Court considered that portion of section 2 of the Fourteenth Amendment which limited the penalty of reduced state representation in Congress to denials of the franchise "except for participation in rebellion, or other crimes." The Court

concluded that this provision gave "affirmative sanction" to "the exclusion of felons from the vote." Id. at 54.

The case sub judice differs from Richardson in two significant ways. First, the disenfranchising crimes in Richardson were felonies whereas the present case concerns an invidiously selected list of non-felonies. Richardson was predicated in part on an examination of the historical background of the Fourteenth Amendment. The Court noted that at the time of the Fourteenth Amendment's ratification most States had provisions in their constitutions which prohibited, or authorized their legislatures to prohibit, the exercise of the franchise by persons convicted of felonies. Congress, in readmitting the seceded states to the Union, authorized those states to deny the franchise for "participation in the

rebellion or for felony at common law'." 418 U.S. at 48,49. There was, however, no similar finding that the "historical understanding of the Fourteenth Amendment" confirmed the disenfranchisement of misdemeanants. Richardson has never been applied to uphold a disenfranchisement of non-felons.

Indeed, those states which disenfranchise citizens for criminal convictions have generally limited that penalty to convictions of election-related offenses, some subset of serious felonies, or at most all felonies and "infamous crimes." See generally Note, Restoring the Ex-Offender's Right to Vote: Background and Developments, 11 AM. Crim. L. Rev. 721, 727-29, 758-70 (1973); Special Project, The Collateral Consequences of a Criminal Conviction, 23 Vand. L. Rev. 929, 975-77 (1970). According to these two surveys,

published in the early 1970's, only two states, Alabama and Georgia disenfranchised for specified non-felony offenses, defined as involving moral turpitude. Note, supra, 11 Am. Crim. L. Rev. at 758-61 and 766 n. 217; Special Project, supra., 23 Vand. L. Rev. at 976 n.251. The current Georgia Constitution disenfranchises only persons convicted of "a felony involving moral turpitude." GA. Const. Art 2, sec. 1 para 3(a). (emphasis supplied). Consequently, Alabama may be the only state which today disenfranchises any category of non-felons.

The Court, however, need not resolve the applicability of Richardson to the exclusion of misdemeanants because what clearly sets this case apart from Richardson is not the felony/non-felony distinction but the finding of invidious discriminatory intent. There was no conten-

tion in Richardson that the disenfranchisement provision at issue was adopted for racially discriminatory purposes, or, for that matter, out of a political or wealth-based animus. Richardson considered only the question whether the denial of the right to vote to felons was per se unconstitutional.

The presence of discriminatory intent is central to this Court's interpretation of the Equal Protection Clause of the Fourteenth Amendment. See, e.g., City of Mobile v. Bolden, supra, Arlington Heights v. Metropolitan Housing Development Corp., supra, Washington v. Davis, 426 U.S. 229 (1976). Particularly where the right to vote is at stake, state laws or practices which would be constitutional if they were adopted for a legitimate purpose have been held unconstitutional if they were adopted for a constitutionally proscribed reason.

Thus, in City of Mobile v. Bolden, supra, and White v. Regester, 412 U.S. 755 (1973) the Court held that multi-member or at-large election districts are a constitutional voting mechanism. When such a system, neutral on its face, "is subverted to invidious purposes," it violates the Fourteenth Amendment. Rogers v. Lodge, 458 U.S. 613, 621-22 (1982); White v. Regester, supra, 412 U.S. at 765-70. Similarly, in Lassiter v. Northampton County Bd. of El., 360 U.S. 45 (1959), this Court held that a State's use of a literacy test to qualify voters is consistent with the Fourteenth Amendment. Yet, in South Carolina v. Katzenbach, supra, the Court held that where literacy tests "have been instituted with the purpose of disenfranchising Negroes, have been framed in such a way as to facilitate this aim, and have been

administered in a discriminatory fashion," literacy tests violate the Constitution. 383 U.S. at 333-34.

In other words, even if Richardson v. Ramirez is interpreted to authorize the State of Alabama, for legitimate reasons, to disenfranchise persons convicted of non-felonies involving moral turpitude, the case does not support such action when taken for a constitutionally proscribed purpose. Appellees allege and the Court below found that the State acted out of racial animus, which the Fourteenth Amendment prohibits. Appellants contend that the State acted out of wealth-based or political animus, which are also constitutionally forbidden justifications. Appellants have alleged no constitutionally permissible reason for the disenfranchisement of non-felons, let alone a compelling state purpose. Under these

circumstances, the Court must affirm the Court of Appeals' conclusion that the disenfranchisement clause violates the Fourteenth Amendment.

V. THE TENTH AMENDMENT PROVIDES NO PROTECTION FOR A STATE DISENFRANCHISEMENT MEASURE WHICH VIOLATES THE FOURTEENTH AMENDMENT

Appellants argue that the State of Alabama has broad power secured by the Tenth Amendment to grant or deny the suffrage. But "no State can pass a law regulating elections that violates the Fourteenth Amendment...." Williams v. Rhodes, 393 U.S. 23, 29 (1968). The Thirteenth, Fourteenth and Fifteenth Amendments "were specifically designed as an expansion of federal power and an intrusion on state sovereignty." City of Rome v. United States, 446 U.S. 156, 179 (1980). Particularly in the area of voting rights the Civil War Amendments

"supersede contrary exertions of state power." South Carolina v. Katzenbach, 383 U.S. at 325. The principles of Tenth Amendment federalism articulated in National League of Cities v. Usery, 426 U.S. 833 (1976), do not constrain the Fourteenth Amendment. Fitzpatrick v. Bitzer, 427 U.S. 445, 451-56 (1976). See also City of Rome v. United States, supra, 446 U.S. at 178-80 (National League of Cities does not limit the Fifteenth Amendment). In short, the Tenth Amendment provides no independent justification for a state disenfranchisement measure which violates the Fourteenth Amendment.

VI. THE MISDEMEANANTS DISENFRANCHISEMENT CLAUSE VIOLATES THE VOTING RIGHTS ACT.

As amended in 1982, section 2 of the Voting Rights Act, 42 U.S.C. § 1973(a) bars the use of any "voting qualification

or prerequisite to voting or standard, practice, or procedure....which results in a denial or abridgement of the right to vote of any citizen of the United States on account of race or color." The section prohibits not only official action taken or maintained for a racially discriminatory purpose, but also any official action that results in the impairment or denial of the right to vote of any citizen on account of race. United States v. Marengo County Commission, 731 F. 2d 1546 (11th Cir. 1984) appeal dismissed, 83 L.Ed.2d 311 (Nov. 5, 1984)(No. 84-243). Thus, "discriminatory intent need not be shown to establish a violation." Id. at 1564.

Section 2 plainly applies to State restrictions on the right to register, as well as to districting schemes that dilute minority voting strength. Harris v. Graddick, 593 F. Supp. 128, 132 (M.D. Ala.

1984). As the court below found, the disenfranchisement of misdemeanants disproportionately affects blacks (J. S. at A-11). Consequently, a prima facie case of a "voting qualification" which results in a denial of the right to vote on account of race is made out.

CONCLUSION

For the reasons stated, the decision of the United States Court of Appeals for the Eleventh Circuit should be affirmed.

Respectfully submitted,

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